[redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 389

FRANK WALTERS AND EDWARD WILLIAMS, JR., APPELLANTS,

vs.

THE CITY OF ST. LOUIS, JOSEPH M. DARST, MAYOR, AND DEL L. BANNISTER, COLLECTOR

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DEC. 30, 1953.

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[fol. 1]

IN THE CIRCUIT OF THE CITY OF ST. LOUIS, DIVISION No. 2, STATE OF MISSOURI

FRANK WALTERS AND EDWARD WILLIAMS, JR., Plaintiffs,

vs.

THE CITY OF ST. LOUIS, JOSEPH M. DARST, MAYOR, AND DEL L. BANNISTER, Collector, Defendants

No. 58,430

AMENDED PETITION

Come now the plaintiffs, by leave of court, first had and obtained and herewith file their first amended petition and state:

1. That plaintiff Frank Walters is and at all times herein mentioned has been a resident of the City of St. Louis, Missouri; that plaintiff Edward Williams, Jr., is and at all times herein mentioned has been a resident of St. Louis County, Missouri; that defendant City of St. Louis is and was at all such times a municipal corporation duly organized, existing and functioning as such under the applicable laws of the State of Missouri; that defendant Joseph M. Darst at all such times was and is the duly elected, qualified and acting Mayor of the City of St. Louis, Missouri, and as such is its Chief Executive Officer; and that defendant Del L. Bannister is and was at all such times the duly elected, qualified and acting Collector of the City of St. Louis, Missouri, and was and is in charge of the Collection Division of the Department of Finance of said City of St. Louis, Missouri; and that defendant Shapleigh Hardware Company at all such times was and is a corporation duly organized and existing according to law and having its chief office and place of business in the City of St. Louis, State of Missouri, and within the jurisdiction of this court.

[fol. 2] 2. That they are now and at all times herein mentioned have been employees of defendant Shapleigh Hardware Company and as such are paid wages and compensation from time to time for their services working as such employees, said payments being made to them on a regular

weekly basis, and that said defendant corporation as their employer has withheld and has threatened and intends to withhold one-half of one percent of the wages and compensation to which they were and are presently entitled and will be entitled in the future by reason of the enactment of an alleged ordinance by the Board of Aldermen of the City of St. Louis, Missouri, purporting to charge a tax against the plaintiffs as well as other employees of corporations who are residents of the City of St. Louis, Missouri, known as a so-called "Earnings Tax," as is hereinafter more fully alleged.

3. That a certain Act was passed by the 66th General Assembly of the Missouri Legislature at its regular session duly called and held at the city of Jefferson City, Missouri, known as House Substitute for House Bill No. 50 of said 66th General Assembly now known as (V. A. M. S., Sec. 92.110-92.200), wherein and whereby it was attempted to be provided by said Act of said Legislature that authority would be given to constitutional charter cities having a population of more than 700,000 inhabitants to levy and collect by ordinance for general revenue purposes an earnings tax on the salaries, wages, commissions and other compensation earned by its residents and also on the salaries, wages, commissions and other compensation earned by non-residents of the city for work done or services performed or rendered in the city, also attempting to authorize exemptions and deductions from the gross earnings of employees and attempting to authorize and impose upon employers the duty of collecting and remitting to the city any tax that may be levied upon the earnings of employees pursuant to this act and to prescribe penalties for failure to [fol. 3] perform such duty with an expiration date, which act of said 66th General Assembly of the State of Missouri is hereby incorporated in this petition by this reference as part hereof.

4. That defendant City of St. Louis is a municipal corporation as hereinbefore alleged, is a city within the territorial limits of the State of Missouri, which at the present time and at the time of the enactment of said House Bill No. 50 was and now is a constitutional charter city having a population of more than 700,000 inhabitants.

5. That on or about the 27th day of August, 1952, that

the Board of Aldermen of the City of St. Louis, which is the legislative body or Municipal Assembly thereof, attempted to enact into law a certain ordinance known as Ordinance No. 46222, which is identified as an earnings tax ordinance wherein and whereby said ordinance attempts to levy and impose an earnings tax for general revenue purposes of one-half of one per cent on salaries, wages, commissions and other compensation earned after August 31, 1952, by residents of the City of St. Louis, and on salaries, wages, commissions and other compensation earned after August 31, 1952, by non-residents of said City, for work done or services performed or rendered in said City, and providing for the filing of returns and payment of the tax by individuals, associations, businesses, corporations, fiduciaries, and other entities, and for the furnishing of information by such taxpayers and by employers, and imposing on employers the duty of collecting the tax at the source and prescribing the duties and powers of the Collector, and providing for interest and penalties on delinquencies, and providing that the divulgence of confidential information or the failure, neglect, or refusal to make any return required under said alleged ordinance, or the failure, neglect, or refusal of any employer to withhold or pay over to the City any amount of tax subject to with-[fol. 4] holding under said alleged ordinance, or the refusal to permit authorized examinations by the Collector, or the making knowingly, of an incomplete, false or fraudulent return, or the attempt to do anything whatsoever to avoid the full disclosure of the amount of earnings or profits shall constitute a misdemeanor; and providing generally for the administration and enforcement of said ordinance and the collection of the said tax, and attempts to empower the defendant Collector of the City of St. Louis to promulgate necessary rules and regulations for the administration of the tax, and authorizing every employer collecting and remitting the tax to deduct and retain therefrom three per cent of the total amount withheld by such employer; containing a separability clause and repealing Article XIV of Chapter 23 of the Revised Code of the City of St. Louis, Missouri, 1948, and attempting to contain an emergency clause, a copy of which ordinance is hereto attached as

Exhibit "A" and is hereby incorporated in this petition by this reference as part hereof.

6. That it is claimed by all the defendants herein named that said Ordinance is in full force and effect and will be enforced, and as above alleged defendant Shapleigh Hardware Company, a corporation, as employer of the plaintiffs has collected and has threatened and intends to continue to collect from the plaintiffs as its employees sums of money amounting to one-half of one percent of the wages and compensation earned by them as such employees after August 31, 1952.

7. That defendant Del L. Bannister, as revenue Collector of the City of St. Louis and in charge of its collection of revenue, has threatened to take into his possession as such Collector and from the defendant Shapleigh Hardware Company, a corporation, such funds as may be collected by said defendant corporation from its employees, including these plaintiffs.

[fol. 5] 8. That at all times herein mentioned and more particularly during the session of the 66th General Assembly of the State of Missouri and at the time when said so-called Enabling Act, House Bill No. 50, was passed by the 66th General Assembly of the State of Missouri, it was provided in the Constitution of the State of Missouri, as follows:

"Article III, Section 40:

"The General Assembly shall not pass any local or special law:

"(21) creating offices, prescribing the powers and duties of officers in, or regulating the affairs of counties, cities, townships, election or school districts;"

"(30) Where a general law can be made applicable and whether a general law could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on that subject;"

"Article III, Section 42:

"Section 42. No local or special law shall be passed unless a notice, setting forth the intention to apply therefor and the substance of the contemplated law,

shall have been published in the locality where the matter or thing to be affected is situated at least thirty days prior to the introduction of the bill into the General Assembly and in the manner provided by law. Proof of publication shall be filed with the general assembly before the act shall be passed and the notice shall be recited in the act."

"Article X, Section 11 (f):

"Nothing in this Constitution shall prevent the enactment of any general law permitting any county or other political subdivision to levy taxes other than ad valorem taxes for its essential purposes."

[fol. 6] 9. That said Act of the 66th General Assembly of the State of Missouri, hereinabove referred to in paragraph 3 of this petition as House Bill No. 50, violates each and all of the foregoing provisions of the Constitution of Missouri then in full force and effect and binding upon each of the defendants herein, for the reason that said Bill so attempted to be enacted by the General Assembly of the State of Missouri is a special law applying only to the City of St. Louis and is not a general law and does not comply with the foregoing provisions of the Constitution of Missouri with respect to local or special laws; and that said Bill of the 66th General Assembly specifically provides therein that it shall expire at a certain fixed date which is prior to the time of the next decennial census, which next decennial census will not occur until the calendar year 1960.

10. That at all times herein mentioned and more particularly at the time said Board of Aldermen of said City of St. Louis passed said "earnings" tax Ordinance No. 46222, as aforesaid, and said General Assembly passed said House Bill 50, it was provided in the Constitution of the State of Missouri, as follows:

"Article X, Section 3:

"Limitation of taxation to public purposes—uniformity—general laws—time for payment of taxes—valuation:

"Taxes may be levied and collected for public purposes only, and shall be uniform upon the same class

of subjects within the territorial limits of the authority levying the tax. All taxes shall be levied and collected by general laws and shall be payable during the fiscal or calendar year in which the property is assessed. Except as otherwise provided in this constitution, the methods of determining the value of property for taxation shall be fixed by law."

[fol. 7] "Article I, Section 10:

"Due process of law:

"That no person shall be deprived of life, liberty or property without due process of law."

11. That said ordinance hereinabove referred to, and said enabling act, House Bill No. 50, violated each and all of the foregoing provisions of the Constitution of Missouri and the equal protection of the laws requirements of the Fourteenth Amendment of the Constitution of the United States then in full force and effect and binding upon each of the defendants herein for the reason that said ordinance and House Bill No. 50 seek to levy and collect taxes not uniform upon the same class of subjects and not within the territorial limits of said City of St. Louis, and further that said Ordinance and House Bill are arbitrary and discriminatory against wage earners as a class and particularly these plaintiffs.

12. That the Constitution of the State of Missouri in full force and effect and binding on all of the defendants at all times mentioned herein provided as follows in Article III, Section 22:

"Article III, Section 22. Every bill shall be referred to a Committee of the House in which it is pending. After it has been referred to a committee, one-third of the elected members of the respective Houses shall have power to relieve a committee of further consideration of a bill and place it on the calendar for consideration. Each committee shall keep such record of its proceedings as is required by rule of the respective Houses and this record and the recorded vote of the members of the committee shall be filed with all reports on bills."

13. That plaintiffs are informed and believe and therefore allege the fact to be that at the time said Bill was [fol. 8] pending before the 66th General Assembly of the State of Missouri that the appropriate committee of the House of Representatives, constituting one of the Houses of said General Assembly, caused a record of its proceedings to be kept as required by said Constitutional provision above referred to, and filed the recorded vote of the members of such House committee with such bill; but that in the Senate of the State of Missouri, being also a House of the 66th General Assembly and without whose valid action no bill may properly become a law, the appropriate committee to which said bill was referred failed to keep a record of its proceedings in regard to said Bill so pending before the Senate as a House of the said 66th General Assembly and failed to file with its report the recorded vote of the members of such Senate committee, all of which more fully appears by the report attached to the original and official Bill, namely, said House Bill No. 50, as passed by said General Assembly as the same was and should now be filed in the office of the Secretary of State of the State of Missouri at the seat of government at Jefferson City, Missouri.

14. Plaintiffs furthermore state that under the Charter of the City of St. Louis which was duly adopted by the voters of said City on June 30, 1914, and which has at all times herein mentioned, been in full force and effect and binding upon all of the defendants herein, no provision is made therein for the enactment by the Board of Aldermen, being the municipal assembly, of the City of St. Louis of a tax imposing an earnings tax upon the residents and non-residents of the City of St. Louis and which said denial of authority to the legislative body of the City of St. Louis has recently been determined by a decision of the Supreme Court of the State of Missouri in a suit brought for that purpose by Carter Carburetor Corporation against the City of St. Louis, and plaintiffs are informed and believe and therefore allege the fact to be that the law of the State of [fol. 9] Missouri is applicable to each and all of the defendants herein and binding upon the plaintiffs and their corporate employer as aforesaid so that the City of St. Louis as a municipal corporation is denied the right to levy an earnings tax.

15. That the said act referred to as House Bill No. 50 of the 66th General Assembly of the State of Missouri and said Ordinance are unconstitutional and void and in violation of the terms of the Constitution of the State of Missouri as hereinbefore more specifically alleged, and that the City of St. Louis acting by its Board of Aldermen was wholly without authority to adopt or attempt to adopt said ordinance to impose any such earnings tax upon these plaintiffs, and who are employed by corporations having their offices and businesses in the City of St. Louis, Missouri, as does defendant Shapleigh Hardware Corporation, and that said act of the Legislature and said ordinance and each and both of them are illegal and void for the reasons heretofore assigned and for the further reasons that the enforcement of such ordinance would impose multiple taxation on these plaintiffs and other employees similarly situated; and that said ordinance and said Act, known as House Bill 50, are arbitrary, unreasonable, discriminatory, vague and uncertain, and in violation of said Article I, Section 10, of said Constitution of Missouri and in violation of the due process and equal protection of the laws requirements of the 14th Amendment of the Constitution of the United States.

16. That the defendants, as aforesaid, in their respective capacities as a corporate employer of the plaintiffs and also as officials of the said municipal corporation, and the said municipal corporation through its agents and employees has caused and intends in the future to cause said ordinance to be put into force and effect and has caused said corporate employer, defendant Shapleigh Hardware Company, to retain wages and compensation belonging to the plaintiffs and [fol. 10] intends to cause it to do so in the future and that unless the said Shapleigh Hardware Company and the other defendants herein, including the agents and employees of the City of St. Louis, are restrained and enjoined by order of this court from attempting to carry into effect said ordinance so adopted by said Board of Aldermen, that wages and compensation belonging to the plaintiffs and earned by them in their work and employment with the Shapleigh Hardware Company will continue to be retained not only as to such funds as may have been earned up to the time of the filing of this suit but as the same will be earned in the future; that plaintiffs will be compelled, unless relief herein

is granted, to file a multiplicity of suits as their wages and compensation are retained by their said employer and that penalties will accrue; and that as a result plaintiffs will suffer irreparable injury and damage and that the damage resulting by the attempted enforcement of such illegal ordinance is and will be incapable of ascertainment by the methods and rules cognizable by a court of law and that plaintiffs are without relief in the premises except as prayed for from this court.

17. That they have no adequate remedy at law and unless this court shall issue its declaratory judgment and decree declaring said ordinance so adopted by the Board of Aldermen of the defendant City of St. Louis on or about the 27th day of August, 1952, as illegal and void and unless this court shall issue its injunction, and enjoin and restrain the defendants as prayed that they will be remediless in the premises and therefore they invoke the jurisdiction of and seek the assistance of this court of equity.

Wherefore, the premises considered, plaintiffs pray:

(a) That this court issue its declaratory judgment, adjudging and decreeing that the said ordinance enacted by [fol. 11] the City of St. Louis by its Board of Aldermen on or about the 27th day of August, 1952, assessing an earnings tax against the plaintiffs by the withholding of wages and compensation by plaintiffs' employer as employees of said corporate defendant be declared illegal and void and of no force and effect;

(b) That this court issue its declaratory judgment, adjudging and decreeing that House Bill No. 50 adopted by the 66th General Assembly of the State of Missouri be declared by it to be illegal and void and of no force and effect;

(c) That this court perpetually restrain and enjoin defendants Darst and Bannister in their official capacities and each of them as such, and the City of St. Louis, and its agents and employees, and restrain and enjoin Shapleigh Hardware Company, a corporation, and its agents and employees, from carrying or attempting to carry said Ordinance into effect; and

(d) For all such other and further relief as in the premises may be proper.

[fol. 12] In Circuit Court of the City of St. Louis
Amended Answer to Plaintiffs' First Amended Petition

Come now the defendants City of St. Louis, a municipal corporation, Joseph M. Darst and Del L. Bannister, and for their joint amended answer to plaintiffs' first amended petition herein, state:

1. These defendants admit each and every allegation of paragraphs 1 and 2 in plaintiffs' amended petition contained.

2. These defendants deny that by House Substitute for House Bill No. 50 the General Assembly "attempted" to grant authority to constitutional charter cities having a population of more than 700,000 inhabitants the power to levy and collect, by ordinance for general revenue purposes, an earnings tax, and deny that by said bill the General Assembly "attempted" to authorize exemptions from such tax, and allege that said House Substitute for House Bill No. 50 did grant to constitutional charter cities of over 700,000 inhabitants the right to levy an earnings tax, and did grant to said cities the right to grant certain exemptions therefrom, and did authorize the delegation to employers the duty of collecting and remitting to the City any and all taxes levied upon the earnings of employees.

3. These defendants admit each and every allegation of paragraph 4 in plaintiffs' amended petition contained.

4. In answer to paragraph 5 of plaintiffs' amended petition, these defendants deny that the Board of Aldermen of the defendant City of St. Louis "attempted" to enact Ordinance No. 46222, and allege that said Board of Aldermen did enact said ordinance, and deny that said ordinance is an "alleged" ordinance, and state that said ordinance is [fol. 13] a valid ordinance of said city, and deny that said ordinance "attempts" to empower the defendant Collector of the City of St. Louis to promulgate the necessary rules and regulations for the administration of the tax, and allege that said ordinance does empower the defendant Collector of the City of St. Louis to promulgate the necessary rules and regulations for the administration of said tax.

5. These defendants admit the allegations of paragraphs 6, 7 and 8 of plaintiffs' amended petition.

6. In answer to paragraph 9 of plaintiffs' amended peti-

tion, these defendants deny that the 66th General Assembly "attempted" to enact House Bill No. 50, and allege that said 66th General Assembly did enact said House Bill No. 50. Further answering the allegations of said paragraph 9, these defendants deny that said House Bill No. 50 is a special law, and allege that said House Bill is a general law; and further aver that, even though the next decennial census will not occur until the calendar year of 1960, other constitutional charter cities may, before the expiration date of said House Bill No. 50, enter the class of cities having a population of over 700,000 by the extension of their limits to include areas having a sufficient population to bring their total population to a number in excess of 700,000. These defendants further aver that, even though no other city may enter the class, said House Bill No. 50 is a general law, and that as such it is a valid and binding enactment of the General Assembly of the State of Missouri. It is a general law inasmuch as it relates to a municipality of the State of Missouri which has been placed by the Constitution of the State in a classification separate and distinct from the four general classes of cities and separate and distinct from other constitutional charter cities provided for in the Constitution, being designated by name in Section 31 of Article VI, whereby it is recognized both as a city and as a county.

[fol. 14] 7. These defendants further state that House Substitute for House Bill No. 50 was designed to meet a definite emergency in the City of St. Louis resulting from the inadequacy of existing sources of revenue to enable the said city to continue to function both as a city and as a county under established sources of revenue; that this emergency was brought to the attention of the Governor of the State of Missouri by resolution of the Board of Aldermen of the City of St. Louis adopted on the 19th day of May, 1950; and that by resolutions adopted on October 19, 1951, and November 16, 1951, the General Assembly was urged to enact House Substitute for House Bill No. 50 for the stated reason that the City of St. Louis was in dire need of additional revenue and it was imperative that the said House Committee Substitute for House Bill No. 50 be adopted, so that the financial solvency of the City might be maintained. These defendants further state and show to the Court that

no similar plea on behalf of any other municipality of the State was received by the 66th General Assembly.

8. These defendants further state that the emergency confronting the City of St. Louis resulted from the fact that the expenditures necessary to enable it to function in its dual capacity as a city and a county had increased from $21,752,165 in the fiscal year 1943-1944, to $43,052,595 in the fiscal year 1951-1952. These defendants state that the established sources of revenue in the said City of St. Louis were insufficient to provide funds for these expenditures; that to meet this emergency the General Assembly passed an Enabling Act, approved by the Governor, May 28, 1948, authorizing the City of St. Louis to levy a tax on earnings; that the provisions of this Act terminated on July 17, 1950; that the City of St. Louis levied a tax under authority of the said Enabling Act of 1948, and collected said taxes until July 17, 1950; that the proceeds of the said tax amounted to $12,906,085; that during the two years that the said tax was in effect the City was able to operate without a deficit, but [fol. 15] that since the termination of the said tax, expenditures have exceeded revenue to such an extent that the operating deficit from the year 1951 to 1952 amounted to $3,307,138.

9. These defendants admit the allegations of paragraph 10 of plaintiffs' amended petition.

10. These defendants deny each and every allegation in paragraph 11 of plaintiffs' amended petition contained.

11. These defendants admit each and every allegation in paragraph 12 of plaintiffs' amended petition.

12. These defendants admit that the appropriate committee of the House of Representatives caused a record of its proceedings to be kept on said Bill, but deny that the appropriate committee of the Senate to which said Bill was referred failed to keep a record of its proceedings in regard to said Bill and failed to file with its report the recorded vote of the members of such Senate Committee. On the contrary, these defendants state that the Ways and Means Committee of the Senate to which the said Bill was referred filed with its report to the Senate a record of its proceedings in connection with the said Bill and the recorded vote of the members of the Committee in connection with said bill in compliance with the rule of the Senate

adopted pursuant to said Section 22 of Article III of the Constitution of Missouri, and said rule reading as follows:

> "Rule 44. Each committee shall keep a record of the total number of members present when a bill is finally considered, and this record, and the record of the total number voting favorably and the total number voting unfavorably on said bill, shall be filed by the committee with its report (Constitution, Article III, Section 22)."

[fol. 16] These defendants state that, in accordance with the foregoing rule, the Ways and Means Committee of the Senate of the 66th General Assembly, to which House Substitute for House Bill No. 50 was referred, kept a record of the total number of members present when said bill was finally considered by said committee, and that on the 4th day of March, 1952, when said committee reported said bill, with the recommendation that the bill be passed with Senate Committee Amendment No. 1, it filed with its report the record of the total number of members present when the bill was finally considered, and the record of the total number voting favorably and the total number voting unfavorably on said bill. These defendants further state that said record of the Ways and Means Committee of the Senate has been continuously, and now is, in the custody of the Secretary of the Senate in his office in the State Capitol and will in due course be filed in the office of the Secretary of State.

13. These defendants further state that said Rule No. 44 has been adopted by each Senate since the effective date of the Constitution of 1945; that said rule has been in full force and effect throughout each General Assembly from said date to the present time, and that the several committees of the Senate have uniformly reported on all bills which have been passed by the Senate in each session of the Legislature since the 1945 Constitution became effective in the manner provided in said rule; that the Senate has thereby construed the provisions of Section 22 of Article III of the Constitution to require only that there be recorded the number of members of a committee voting for a bill and the number voting against such bill, and such legislative

construction, existing from the date of adoption of the Constitution, and being reasonable and proper, should be recognized and approved by the courts.

14. These defendants further state that Section 30 of Article III of the Constitution of Missouri provides:

> [fol. 17] "No bill shall become a law until it is signed by the presiding officer of each house in open session, who first shall suspend all other business, declare that the bill shall now be read and that if no objection be made he will sign the same. If in either house any member shall object in writing to the signing of a bill, the objection shall be noted in the journal and annexed to the bill to be considered by the Governor in connection therewith. When a bill has been signed, the secretary, or the chief clerk, of the house in which the bill originated shall present the bill in person to the governor on the same day on which it was signed and enter the fact upon the journal."

15. These defendants state that pursuant to the foregoing constitutional provision the President of the Senate announced on the 2nd day of April, 1952, in open session of the Senate, that all other business would be suspended and House Substitute for House Bill No. 50, having passed both branches of the General Assembly, would be read at length by the Secretary, and that if no objections were made the bill would be signed by the President, to the end that it might become a law. These defendants state that the bill was so read by the Secretary, that no objections were made, and that it was signed by the President in open session.

16. These defendants further state on the 2d day of April, 1952, in open session of the House of Representatives, all other business was suspended while House Substitute for House Bill No. 50 was read at length; that there was no objection, and that the said bill was signed by the Speaker to the end that it might become a law.

17. These defendants admit that the Charter of the City of St. Louis was duly adopted by the voters of said city on June 30, 1914, and deny each and every other allegation contained in paragraph 14 of plaintiffs' amended petition. [fol. 18] Further answering said paragraph 14, these de-

fendants state that the case of Carter Carburetor Corporation against the City of St. Louis was decided upon the ground that no statutory authority existed for the levy of an earnings tax by the City of St. Louis, and that, in view of the provisions of House Substitute for House Bill No. 50, statutory authority does now exist for the adoption of Ordinance No. 46222, and did exist at the time of its enactment.

18. These defendants deny each and every allegation of paragraphs 15, 16 and 17 in plaintiffs' amended petition contained.

Wherefore, the premises considered, these defendants pray the Court to interpret and construe the sections of the Constitution of Missouri cited by plaintiffs, to wit, Sec. 40 of Art. III, particularly Subdivisions 21 and 30 thereof; Sec. 42 of Art. III; Sec. 11 (f) of Art. X; Sec. 3 of Art. X; Sec. 10 of Art. I, and Sec. 22 of Art. III, and to enter its declaratory judgment adjudging and decreeing that the said Act was not passed in violation of and does not violate any of the foregoing provisions of the Constitution of Missouri.

IN CIRCUIT COURT OF THE CITY OF ST. LOUIS

AGREED STATEMENT OF FACTS

The respective parties hereto agree that the facts in this cause are as follows, subject to the right of any party to object to the relevancy, materiality or competency of any fact herein stated. It is further agreed that the defend- [fol. 19] ant's motion to strike overruled by the trial court November 10, 1952, is hereby renewed as to all of plaintiff's evidence in support of paragraphs 12 and 13 of plaintiffs' first amended petition and objection is made to the admission of said testimony for the reasons therein stated.

1. Plaintiff Frank Walters is a resident of the City of St. Louis and plaintiff Edward Williams, Jr., is a resident of St. Louis County, Missouri. Both are employed by defendant Shapleigh Hardware Co. in the City of St. Louis as truck drivers. Defendant Shapleigh Hardware Co. is a corporation organized and existing under the laws of Missouri and has its principal place of business in St. Louis,

Missouri. Defendant City of St. Louis is a municipal corporation, organized under a special charter adopted pursuant to constitutional grant of authority. Defendant Joseph M. Darst is the duly elected, qualified and acting Mayor of the City of St. Louis, and the defendant Del L. Bannister is the duly elected, qualified and acting Collector of Revenue of the City of St. Louis and as such is in charge of the collection of all taxes, including taxes levied under and pursuant to Ordinance 46222. Plaintiffs are wage earners and defendant Shapleigh Hardware Co. pays plaintiffs their wages computed on an hourly basis and makes such payments to plaintiffs on a weekly basis; defendant Shapleigh Hardware Company has to the date of the submission of this cause withheld from the wages of plaintiff Frank Walters the amount of $5.35 and from the wages of Edward Williams, Jr., the amount of $6.43, and will continue to do so until some final adjudication with respect to the validity of said Ordinance 46222 is obtained. Defendant Shapleigh Hardware Co. lays no claim to the funds in question.

2. House Substitute for House Bill No. 50 (now known as V. A. M. S., Secs. 92.110-92.200) was passed by the 66th General Assembly of the State of Missouri in order to en- [fol. 20] able constitutional charter cities with a population of over 700,000 to adopt a so-called earnings tax; it is requested that said House Bill No. 50 be judicially noticed and be incorporated herein by reference. Defendant City of St. Louis is a constitutional charter city having a population of more than 700,000 persons according to the Federal decennial census of 1950, and is the only municipality having a population of more than 700,000 persons within the State of Missouri. The next Federal decennial census is not scheduled to be taken until 1960.

3. On August 27, 1952, the Board of Aldermen enacted into law Ordinance 46222, a so-called earnings tax ordinance, and on August 28, 1952, defendant Del L. Bannister did issue on behalf of defendant City of St. Louis, pursuant to Section Nine of said ordinance, in pamphlet form, certain information, instructions, and regulations as a guide to taxpayers. A copy of said ordinance and said pamphlet is hereto attached, marked Plaintiffs' Exhibit "A," and is incorporated herein by reference, pursuant to which ordi-

nance and enabling act defendant Del L. Bannister claims the funds withheld from the wages of plaintiffs by defendant Shapleigh Hardware Co.

4. The constitutional provisions of Article III, Section 40; Article III, Section 42; Article X, Section 11 (F); Article III, Section 22; Article X, Section 3, and Article I, Section 10 of the Constitution of the State of Missouri of 1945 were in full force and effect at all times mentioned in plaintiffs' petition and are hereby incorporated by reference as though fully set out. The Fourteenth Amendment of the Constitution of the United States was in full force and effect at all times mentioned and is hereby incorporated by reference as a part of this record. No notice setting forth the substance of House Substitute for House Bill No. 50 or any intention to apply therefor was published in the locality of the City of St. Louis thirty days [fol. 21] prior to the introduction of said bill into the General Assembly. All constitutional provisions, state or Federal, legislative enactments, ordinances or city charters are stipulated to have been well pleaded, although no admissions are made as to their applicability and effect, and are hereby incorporated into this stipulation as though fully set out.

5. The provision of said House Substitute for House Bill No. 50 found in Section 11 of said bill and providing the term of said bill shall expire April 1, 1954, was first introduced and approved on March 12, 1952, as Senate Amendment No. 3 to said House Bill, by Senator Garten. Prior to this amendment there had been no time limit on said bill. (See Senate Journal, p. 1832.)

6. The rolls of said House Substitute for House Bill No. 50, together with all amendments to said bill accepted or rejected and the committee reports of the respective houses on said bill are kept in a bound volume in the office of the Secretary of State at Jefferson City, Missouri, as required by R. S. Mo. 1949, Section 28.040. Said House Bill No. 50 was referred to the Committee on Municipal Corporations in the House of Representatives. Filed with the original bill in the office of the Secretary of State is the record of the vote of the names of the members of that Committee who voted favorably on said bill and the names of the members who voted unfavorably and it is agreed that the vote was so taken and recorded in the manner and means set out in said

Committee's report. The rule of the House covering the matter of reports by committees on bills is Rule No. 47, set out at page 55 of the Journal of the House of the 66th General Assembly, and reads as follows:

> "Rule 47. All bills reported back to the House shall be reported on the authority of a majority vote of a quorum of the committee to which said bill was referred [fol. 22] and a record thereof entered upon the records of the meeting of the committee at which the vote was taken. The recorded vote of the members of the committee shall be filed with all reports on bills. (Sec. 22, Art. III, Const.)"

In the Senate the bill was referred to the Committee on Ways and Means and its report appears in the Journal of the Senate for March 4, 1952, at page 1771, and reads as follows:

> "Reports of Standing Committees.
>
> "Senator Webbe, Chairman of the Committee of Ways and Means, submitted the following report:
>
> "Mr. President: Your Committee on Ways and Means, to which was referred House Substitute for House Bill No. 50, begs leave to report that it has considered the same and recommends that the bill do pass, with Senate Committee Amendment No. 1."

The rule of the Senate concerning the filing of committee reports with bills is Rule No. 44, which is set out at page 27 of the Journal of the Senate of the 66th General Assembly, and is as follows:

> "Rule 44. Each committee shall keep a record of the total number of members present when a bill is finally considered; and this record and the record of the total number voting favorably and the total number voting unfavorably on said bill, shall be filed by the committee with its report. (Constitution, Art. III, Sec. 22.)"

The report of the Ways and Means Committee of the Senate filed with the Secretary of the Senate and by the Secretary of the Senate with the Secretary of State in the

State of Missouri, on or about December 4, 1952, shows that ten members of the Committee were present when the Bill [fol. 23] was considered; that nine members of the Committee voted to recommend that the bill do pass, and one member did not vote. The names and the identity of the individual members of the Committee and how they voted was not recorded and does not appear on the Committee's report.

Annexed hereto, marked Defendants' Exhibit 4, and made a part hereto by reference is a certified copy of the record in the said Senate Committee duly certified by the Secretary of State of the State of Missouri, under the date of the 4th day of December, 1952, as filed with the Secretary of State on or about said date; said record was not in said rolls when the rolls of said bill were bound in the office of the Secretary of State.

7. It is stipulated that pages 3849-3889 of the Debates in the Constitutional Convention leading up to our Constitution of 1945 may be judicially noticed by this court and incorporated into this record as though fully set out.

8. It is stipulated that the report of the Senate Ways and Means Committee recommending the passage of said House Bill No. 50 was made in the same manner as the reports of the several committees of the several sessions of the Senate in the 63rd, 64th, 65th and 66th General Assemblies, on all bills passed at each of said sessions thereof, as shown by the journals of the Senate of these sessions of the General Assembly and the rolls of said bills as filed in the office of the Secretary of State, each one of which was equally subject to the provisions of Section 22 of Article III of the Constitution of Missouri.

9. It is agreed that the Journal of the House of the 66th General Assembly at page 2129 contains the following entry:

> "All other business was suspended while House Bills Nos. 184, 36, 501, 325, Senate Substitute for House Bill No. 271, House Bill No. 232, House Committee Substi- [fol. 24] tute for House Bill 227, Senate Committee Substitute for House Bill No. 78, Senate Committee Substitute for House Bill No. 76, Senate Committee Substitute for House Bill No. 66, House Bill No. 484, House Bill No. 465, House Substitute for House Bill

No. 50, House Joint Concurrent Resolution No. 11, House Bill No. 11 and House Committee Substitute for House Bills 55 and 166 were read at length and there being no objection, were signed by the Speaker to the end that they may become a law."

10. It is agreed that the Journal of the Senate of the 66th General Assembly at page 1955 contains the following entry:

"The President announced that all other business would be suspended and House Substitute for House Bill No. 50, having passed both branches of the General Assembly, would be read at length by the Secretary, and if no objections be made the bill would be signed by the President to the end that it may become a law. No objections being made, the bill was so read by the Secretary and signed by the President."

11. The Board of Aldermen of the City of St. Louis by Resolution adopted on the 19th day of May, 1950, directed the attention of the Governor to the inadequacy of existing sources of revenue to enable the City to continue to function both as a city and county and requested that he call a special meeting of the General Assembly for the purpose of continuing the authorization of the defendant City of St. Louis to levy an earnings tax, a true copy of which Resolution is hereto annexed and marked Exhibit 1, and by further Resolution adopted on the 19th day of October, 1951, being Resolution No. 12, and Resolution No. 17, adopted on the 16th day of November, 1951, the Board of Aldermen further urged the General Assembly to adopt an earnings tax measure for the relief of the defendant City, said Resolu- [fol. 24a] being hereto annexed and made a part hereof and marked Exhibits 2 and 3, respectively.

12. It is further stipulated and agreed that expenditures of the defendant City of St. Louis in its dual capacity as a city and county for the fiscal year 1943-1944 amounted to $21,752,165, and that the expenditures by the defendant City in said dual capacity in the fiscal year 1951-1952 amounted to $43,052,595. Established sources of revenue, absent an earnings tax, or an increase of other taxes, or a levy of additional taxes, are insufficient to meet the requirements of appropriations as passed by the Board of Aldermen of

the defendant City. In the fiscal year 1951-1952 the operating deficit of the City amounted to $3,307,138. It is further agreed that the enabling act approved by the Governor on the 28th day of May, 1948, authorizing the City to levy a tax on earnings for the period ending July 17, 1950, and the tax levied pursuant to said act of 1948, yielded a tax during the two-year period of the existence of said ordinance amounting to $12,906,085, and that during the two years that said tax was in effect the City was able to operate without a deficit. It is further agreed that the general property tax rate of the City of St. Louis for general municipal purposes, including levies for the Public Library, the Art Museum and the Zoological Park, was $1.37 per $100 of assessed valuation for the year 1948; $1.37 for the year 1949; $1.55 for the year 1950; $1.59 for the year 1951, and $1.59 for the year 1952.

[fol. 25] In Circuit Court of the City of St. Louis

Plaintiff's Exhibits to Petition and Statement of Facts

City of St. Louis

Earnings Tax

Information, Instructions and Regulations Relating to the Earnings Tax, as Imposed by Ordinance No. 46222

City of St. Louis
Approved August 28, 1952

Issued by Del. L. Bannister, Collector of Revenue
13 City Hall, St. Louis 3, Missouri

[fol. 25a]

Earnings Tax

Regulations

Foreword

In issuing this booklet it may be best to direct attention to the fact that this is a tax—insofar as *individuals* are concerned—only on salaries, wages and other compensation, and is not in any sense a Comprehensive Income tax, since

income from other sources such as dividends, rents, interest, etc. are not taxable.

This first issue of the rules and regulations, which is flexible, is intended as a guide to those subject to the Earnings Tax and will be supplemented from time to time as may be necessary.

The Collector is ready and willing to assist any taxpayer in fulfilling his obligation and is available for hearings and for the issuance of information.

Del. L. Bannister, Collector.

[fol. 25b] 1. Effective Date

The "Earnings Tax" as imposed by virtue of Ordinance No. 46222 of the City of St. Louis, will apply to all wages, salaries, commissions and other compensation Earned after August 31, 1952.

The Earnings Tax is Not imposed on wages earned Prior to August 31, 1952, but Received After that date.

The date on which wages are Earned and not when wages are Received is the determining factor.

2. Definitions

1. Wages shall include salaries, wages, commissions, and other compensation for personal services.

> Wages, when not paid for in money, will be measured by the fair market value of the merchandise, stock, bonds, room or board, or other considerations given to the employee.

2. Net Profits—The net income of any association, business or corporation remaining after deducting the necessary expenses of operation from the gross profits or earnings.

1. All of the ordinary and necessary expenses incurred to produce said income, including rentals or other payments required to be made as a condition to the continued use or possession of property to which the taxpayer has not taken or is not taking title, or in which the taxpayer has no equity;

2. All losses, actually sustained in said business, including a reasonable allowance for exhaustion, depreciation, ob-

solescence, or wear and tear of property in said business;

3. Debts arising from said business actually ascertained to be worthless and charged off within the year;

4. All taxes paid within the year imposed by authority of the United States or its territories or possessions, or under authority of any state, county, school district or municipality or other taxing subdivision of any state, not including those assessed against local benefits and inheritance taxes.

5. All interest paid within the year on taxpayer's indebtedness.

6. Contributions or gifts made by the taxpayer within the [fol. 25c] taxable year to corporations, associations and societies organized and operated exclusively for religious, charitable, scientific or educational purposes, or for the prevention of cruelty to children and animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, to an amount not in excess of 5 per centum of the amount of the taxpayer's net income on which tax is paid.

3. Who Are Employers

An employer is any individual, association, corporation (including a corporation not organized for profit), governmental administration, agency, arm, authority, board, body, branch, bureau, department, division, sub-division, section or unit, or any other entity, who or that employs one or more persons on a salary, wage, commission, or other compensation basis.

It includes organizations, such as religious and charitable organizations, hospitals, schools, educational institutions, social organizations, and societies and whether organized and operating for profit or not.

4. Who and What Is Taxed

4A Individuals—Resident

The tax is imposed on salaries, wages, commissions and other compensation earned after August 31, 1952, by residents of the City of St. Louis, irrespective of where such wages may be earned.

An Earnings Tax return is required after January 1st and on or before March 30th, by individuals whenever any part of the wages or salaries of the individual have not been subjected to withholding by the employer and remittance for the tax must accompany the return. (See Section 12-A of Regulations).

An annual Earnings Tax return is Not required by an individual taxpayer from all of whose wages or earnings the tax has been withheld by an employer or employers.

Non-Resident

The tax is imposed on salaries, wages, commissions and other compensation earned after August 31, 1952, by non-residents for work done or services performed or rendered within the City of St. Louis.

4-B Professional and Business Men: See Section 12-B of Regulations

4-C Corporations: See Section 12-C of Regulations

[fol. 25d] 5. Rate of Tax

The rate of tax is one-half of one per cent on wages or net profits as herein defined.

6. Returns of Tax Withheld Required by Employer

Each employer is required to make a return monthly and pay to the Collector of Revenue the amount of tax which he has deducted from the salary, wage, commission or other compensation of the individual employee; less a collection compensation of 3 per cent of the amount of tax withheld.

Each employer shall make his return and pay to the Collector on the last day of each month, the amount of taxes withheld from the employees for the preceding month, for example: The amount of taxes deducted during the month of September shall be paid on or before the last day of October.

The form of the Withholding Tax Return will require only the following information be given:

1. Payroll period,
2. Number of employees subject to tax,

3. Total Payroll,
4. Taxable Earnings for period,
5. Actual Tax withheld,
6. Collection Allowance—3% of tax withheld,
7. Amount due.

The remittance for the amount of tax must accompany the return.

The Collector will not require the filing of a copy of the employer's payroll, or the list of the employees from whom the tax was withheld, or the individual accounts or amounts.

7. Records to Be Kept

Employers are required to keep adequate and complete records covering all wage payments, either on regular payroll forms, or on such forms as may be used in the usual accounting practice for their particular type of business.

8. Bonus Payments

Bonus payments, commissions, vacation pay, payment for over-time, etc., are taxable when credited to the account of the employee, provided they have been earned after August 31, 1952.

[fol. 25e] Commissions

A taxpayer whose earnings are derived solely from commissions, where no employer-employee relationship exists, shall be deemed an individual engaged in business as defined in Section One (1) of the Ordinance.

9. Pensions

Pensions are not classified as wages, and are not taxable.

10. Imposition of Tax—Net Business Profits—Residents

1. In the case of trades, businesses, professions, other activities, enterprises or undertakings conducted, operated, engaged in, prosecuted or carried on by residents of St. Louis, there is imposed a tax of one-half of one per cent on the net profits earned after August 31, 1952.

2. For the purpose of construing subsection (c) of section 2 of the Ordinance, the term "a resident or residents"

in the phrase "conducted by a resident or residents" will ordinarily be construed to have reference to the business entity itself, as distinguished from the partners, co-owners, proprietors or other participants in its profits.

3. Generally, a co-partnership, association or other unincorporated enterprise owned by two or more persons will be taxed as an entity. However, in the case of a non-resident partnership, association or unincorporated enterprise which cannot be reached or taxed directly by the City of St. Louis, or if only part of its earnings may be directly taxed, then in either such case, resident partners, co-owners, proprietors or other participants in the profits thereof must include in their declaration and tax return or returns their distributive shares of such profits, or portion thereof not taxed to the business enterprise as an entity, and must pay the tax thereon.

4. The tax imposed under Section 2(c) of the Ordinance is levied upon the entire net profits of the resident trade, business, profession, other activity, enterprise or undertaking, wherever earned, paid or accrued and regardless of the fact that any part of such business or professional activity may have been conducted at or through a place or places of business located outside the City of St. Louis.

11. Imposition of Tax—Net Business Profits—Non-Residents

1. In the case of a non-resident individual, partnership, association, fiduciary or other entity (other than a corpora-[fol. 25f] tion) engaged in the conduct, operation or prosecution of any trade, business, profession, enterprise, undertaking, or other activity, there is imposed a tax of one-half of one per cent of the net profits earned after August 31, 1952, of such trade, business, profession, enterprise, undertaking, or other activity if, and to the extent, conducted in or derived from activity in St. Louis.

2. A non-resident entity within the meaning of subsection (d) of section 2 of the Ordinance which has a branch or branches, office or offices and/or store or stores, warehouse, or other place or places in which the entity's business is transacted, located in the City of St. Louis, shall be considered to be conducting, operating, prosecuting or carry-

ing on a trade, business, profession, enterprise, undertaking or other activity to the full extent of the sum total of all transactions originating or consummated in, by or through such St. Louis branch, office, store, warehouse or other place of business, including (a) billings made on such transactions, or (b) services rendered, or (c) shipments made, or (d) goods, chattels, merchandise, etc., sold, or (e) commissions, fees or other remuneration or payments earned. However, the absence of a branch, office, store, warehouse or other permanent place of business within St. Louis shall not exempt or render non-taxable the net profits of any trade, business, profession, enterprise, undertaking or other activity on which a tax is imposed by this Ordinance.

3. In the case of partnership, association, or other unincorporated business owned by one or more persons the tax, generally, shall be upon said partnership, association, or business enterprise as an entity and not ordinarily upon the partners or members thereof. However, the provisions of Regulation 10 are applicable to render taxable against such resident partners or members their distributive share of any profits of such non-resident entity not taxable under this Ordinance.

4. In determining the proportion or amount of the taxable net profits of a non-resident business entity having a place or places of business within and outside St. Louis, such business entity shall use and apply the provisions set forth in section 3 of the Ordinance. (See Regulation 12.)

12. Net Profits and Earnings Tax Returns

Net profits and Earnings Tax returns are required annually on or before March 30th of each year as follows:

[fol. 25g] A. Individuals

An earnings tax return is required annually by an individual whenever any part of the wages or salaries of the individual has Not been subjected to withholding by the individual's employer or employers.

An annual Earnings Tax return is Not required by any individual taxpayer from all of whose wages or earnings the tax has been withheld by an employer or employers.

B. Professional and Business Men

An annual Earnings Tax return is required of an individual who conducts his own profession or business, such as a lawyer, doctor, or merchant.

A return covering the net earnings of such professional or business man must be made between January 1st and March 30th, of each year on a form obtainable from the Collector of Revenue.

A remittance for the tax must accompany the return.

C. By Corporation, Association or Business

The tax is imposed on the net profits earned after August 31, 1952, by associations, businesses or other activities, conducted by a resident or residents; by associations, businesses or other activities conducted in the City by a non-resident or non-residents; and by all corporations as a result of work done or services performed or rendered, or businesses or other activities conducted in the City.

Where the net profits of a business, association or corporation are derived from work done, services performed or rendered and businesses or other activities conducted both within and without the City, the portion of said net profits subject to tax shall be ascertained as follows:

(1) If such taxpayer shall keep its books and records in such a manner as to show the portion of its net profits which is reasonably attributable to work done, services performed or rendered, and business or other activity conducted in the City, then such portion of said net profits shall be subject to said tax.

(2) If the books and records of such taxpayer are not kept in the manner set out in (1), then the portion of the entire net profits of such taxpayer subject to the tax shall be ascertained by multiplying said entire net profits by an allocation percentage which shall be determined as follows:

(a) The percentage which the Average value of Real and Personal Property (book value), in the City bears to the [fol. 25h] total Average value of Real and Personal Property (book value), within and without the City.

(b) The percentage which the Gross Receipts in the City

bears to the total Gross Receipts within and without the City.

(c) The percentage which Wages, Salaries and other Personal Service Compensation (exclusive of general executive officers), in the City bears to the total Wages, Salaries and other Personal Service Compensation (exclusive of general executive officers), within and without the City.

The percentages so obtained shall be added and the total divided by the number of percentage factors Used.

Example 1:

Corporation having places of business in St. Louis, Chicago and Dallas—

		Total	St. Louis	Percentage
Property	(a)	$100,000.00	$50,000.00	50.00%
Receipts	(b)	500,000.00	200,000.00	40.00%
Wages	(c)	250,000.00	82,500.00	33.00%
				3)123.00%
Allocation Percentage				41.00%

Example 2:

Same corporation owning no Real or Personal Property—

Receipts	(b)	$500,000.00	$200,000.00	40.00%
Wages	(c)	250,000.00	82,500.00	33.00%
				2)73.00%
Allocation Percentage				36.50%

Example 3:

Same corporation owning Real and Personal Property in St. Louis valued at $50,000.00 and owning no Real or Personal Property outside St. Louis—

Property	(a)	$50,000.00	$50,000.00	100.00%
Receipts	(b)	500,000.00	200,000.00	40.00%
Wages	(c)	250,000.00	82,500.00	33.00%
				3)173.00%
Allocation Percentages				57.67%

The allocation percentage so determined is then applied to the total net profits to determine the portion of the net profits that is subject to the tax.

(3) In those instances where the books and records of the taxpayer are not kept in a manner set out in (1); and the allocation formula set out in (2), if used, would result in inequities to the taxpayer, then the taxpayer may submit an alternate formula in detail, which must, however, have the approval of the Collector.

[fol. 25i] The return covering this tax must be made between January 1st and March 30th, of each year on forms to be furnished by the Collector of Revenue.

A remittance for the tax must accompany the return.

13. Fiscal Year

Whenever the fiscal year of any person or association, business or corporation differs from the calendar year, the return of the taxpayer shall be made within 90 days from the end of the fiscal year unless an extension is granted by the Collector. The amount of tax due shall be paid at the time the return is filed.

14. Penalties

1. All taxes imposed by this ordinance and remaining unpaid after they have become due shall bear interest at the rate of six per cent (6%) per annum, and the delinquent taxpayer shall be liable for said tax and interest, and, in addition thereto, to a penalty of one per cent (1%) of the

amount of the unpaid tax for each month or fraction of a month for the first six (6) months of delinquency.

2. All taxes imposed by this ordinance, together with all interest and penalties, shall be recoverable by the City as other debts of like amount are recoverable.

3. Any person or taxpayer who shall fail, neglect or refuse to make any return required by this ordinance, or any employer who shall fail, neglect or refuse to withhold or pay over to the City any amount of tax subject to withholding hereunder, or any person or taxpayer who shall refuse to permit the Collector, or his duly authorized deputy or agent, to examine his books, records or papers, or who shall knowingly make an incomplete, false or fraudulent return, or who shall attempt to do anything whatsoever to avoid the full disclosure of the amount of earnings or profits, shall be deemed guilty of a misdemeanor and shall be subject to a fine of not more than Five Hundred Dollars ($500.00) or by imprisonment for not more than six (6) months, or both such fine and imprisonment.

4. All information pertaining to the earnings tax is confidential and penalty is provided for divulging any information by any City employee.

15. Employee's Withholding Statement

Every employer should furnish each employee with a statement of the tax withheld. This form will not be furnished by the Collector of the Revenue but may be on any form prescribed by the employer.

[fol. 25j] Ordinance 46222

An ordinance levying and imposing an earnings tax for general revenue purposes of one-half of one per cent on salaries, wages, commissions and other compensation earned after August 31, 1952, by residents of the City of St. Louis; on salaries, wages, commissions and other compensation earned after August 31, 1952, by non-residents of the City, for work done or services performed or rendered in the City; on the net profits earned after August 31, 1952, of associations, businesses, or other activities conducted by a resident or residents of the City; on the net profits earned after August 31, 1952, of associations, businesses, or other

activities conducted in the City by a non-resident or non-residents; and on the net profits earned after August 31, 1952, by all corporations as a result of work done or services performed or rendered and business or other activities conducted in the City; prescribing a formula for the ascertainment of the net profits subject to tax of any corporation, or association or business conducted in whole or in part by non-residents of the City, in any case in which the work done, services performed or rendered, and business or other activities conducted are done, performed, rendered, or conducted both within and without the City; authorizing any such taxpayer to file with the Collector an application for an alternative method of allocation or apportionment of the net profits reasonably attributable to work done, services performed or rendered, and business or other activities conducted in the City; prescribing a formula for the ascertainment of earnings subject to tax of any non-resident individual in any case in which the work done, services performed or rendered, and business or other activities conducted are done, performed, rendered or conducted both within and without the City, and empowering the Collector to determine by rule or regulation a different apportionment of such earnings as are reasonably attributable to work done, or services performed or rendered in the City in cases where the services rendered are of a peculiar nature, or where the basis of compensation is unusual, or for any other reason; providing for the filing of returns and payment of the tax by individuals, associations, businesses, corporations, fiduciaries, and other entities, and for the furnishing of information by such taxpayers and by employers; imposing on employers the duty of collecting the tax at the source; prescribing the duties and powers of the Collector; providing for interest and penalties on delinquencies; providing that the divulgence of confidential information or the failure, neglect, or refusal to make any return required under this ordinance, or the failure, neglect, or refusal of any employer to withhold or pay over to the City any amount of tax subject to withholding under this ordinance, or the refusal to permit authorized examinations by the Collector, or the making, knowingly, of an incomplete, [fol. 25k] false, or fraudulent return, or the attempt to do

anything whatsoever, to avoid the full disclosure of the amount of earnings or profits, shall constitute a misdemeanor; providing generally for the administration and enforcement of this ordinance and the collection of the tax; empowering the Collector to promulgate necessary rules and regulations for the administration of the tax; providing that income exempt from the state income tax laws shall be exempt from taxation under the provisions of this ordinance; authorizing every employer collecting and remitting the tax to deduct and retain therefrom three per cent (3%) of the total amount withheld by such employer; containing a separability clause; repealing Article XIV of Chapter 23 of the Revised Code of the City of St. Louis, Missouri, 1948; and containing an emergency clause.

Be it ordained by the City of St. Louis, as follows:

Section One. As used in this ordinance, the following words shall have the meaning ascribed to them in this section, except where the context clearly indicates or requires a different meaning:

"Association"—A partnership, limited partnership, or any other form of unincorporated business or enterprise, owned by two or more persons.

"Business"—An enterprise, activity, profession, trade or undertaking of any nature conducted for profit or ordinarily conducted for profit, whether by an individual, association, or any other entity other than a corporation.

"City"—The City of St. Louis.

"Collector"—The Collector of the Revenue of The City of St. Louis.

"Corporation"—A corporation or joint stock association organized under the laws of the United States, the State of Missouri, or any other state, territory, or foreign country or dependency.

"Employer"—An individual, association, corporation, (including a corporation not for profit) governmental administration, agency, arm, authority, board, body, branch, bureau, department, division, subdivision, section or unit, or any other entity, who or that employs one or more persons on a salary, wage, commission, or other compensation basis,

whether or not such employer is engaged in business as hereinbefore defined.

"Net Profits"—The net income of any association, business or corporation remaining after deducting the necessary expenses of operation from the gross profits or earnings.

"Non-resident"—An individual, association, business, corporation, fiduciary or other entity domiciled outside the City.

[fol. 251] "Person"—Every natural person, association, business or fiduciary. Whenever the term "person" is used in any clause prescribing and imposing a penalty, the term, as applied to associations, shall mean the partners thereof, and, as applied to corporations, the officers thereof.

"Resident"—An individual, association, business, corporation, fiduciary or other entity domiciled within the City.

"Taxpayer"—A person, whether an individual, association, business, corporation, fiduciary, or other entity required hereunder to file a return of earnings or net profits, or to pay a tax thereon.

Section Two. A tax for general revenue purposes of one-half of one per centum is hereby imposed on (a) salaries, wages, commissions and other compensation earned after August 31, 1952, by resident individuals of the City, including the entire distributive share of any member of a partnership or association, less the amount thereof, if any, which may be shown to have been taxed under the provisions hereof to said association or partnership; and on (b) salaries, wages, commissions and other compensation earned after August 31, 1952, by non-resident individuals of the City, for work done or services performed or rendered in the City; and on (c) the net profits earned after August 31, 1952, of associations, businesses, or other activities conducted by a resident or residents, and on (d) the net profits earned after August 31, 1952, of associations, businesses, or other activities conducted in the City by a non-resident or non-residents; and (e) on the net profits earned after August 31, 1952, by all corporations as a result of work done or services performed or rendered, and business or other activities conducted in the City.

Said tax shall first be levied, collected and paid with respect to that portion of salaries, wages, commissions, other compensation and net profits earned after August 31, 1952, and prior to January 1, 1953, and thereafter said tax shall be levied, collected and paid on the basis of the calendar year; provided, however, that where the fiscal year of any person, association, business or corporation differs from the calendar year, the tax shall first be applied to that portion of the net profits for the fiscal year as shall be earned after August 31, 1952, and thereafter on the fiscal year basis.

Section Three. The net profits subject to tax of any corporation, or of any association or business conducted in whole or in part by non-residents of the City, in any case in which the work done, services performed or rendered, and business or other activities conducted are done, performed, rendered or conducted both within and without the City, shall be ascertained as follows, to-wit:

[fol. 25m] (a) If such taxpayer shall keep its books and records in such a manner as to show the portion of its net profits which is reasonably attributable to work done, services performed or rendered, and business or other activity conducted in the City, then such portion of said net profits shall be subject to said tax.

(b) If the books and records of such taxpayer are not kept in such a manner so as to show the portion of its net profits which is reasonably attributable to work done, services performed or rendered, and business or other activity conducted in the City, then the portion of the entire net profits of such taxpayer subject to tax shall be ascertained by multiplying said entire net profits by an allocation percentage which shall be determined as follows, towit:

(1) The percentage which the average value of such taxpayer's real and tangible personal property within the City during the period covered by its return bears to the average value of all its real and tangible personal property wherever situated during such period shall first be ascertained.

(2) The percentage which the gross receipts of such taxpayer derived from business within the City during the period covered by its return bear to the total of such gross

receipts wherever derived, shall then be ascertained. Gross receipts derived from business within the City shall be the amount of gross receipts from (a) sales (including also sales of services), except those negotiated or effected in behalf of such taxpayer by agents or agencies, chiefly situated at, connected with, or sent out from premises for the transaction of business owned or rented by such taxpayer outside the City, and (b) rentals or royalties from property situated, or from the use of patents, within the City.

(3) The percentage which the total wages, salaries and other personal service compensation during the period covered by its return, of its employees within the City, except general executive officers, bears to the total wages, salaries and other personal service compensation during such period of all of such taxpayer's employees within and without the City, except general executive officers, shall then be ascertained.

(4) The percentages determined in accordance with subparagraphs 1, 2 and 3 above, or such of the aforesaid paragraphs as shall be applicable to the particular taxpayer's business, shall be added together and the total so obtained shall be divided by the number of percentages used in arriving at said total. The result so obtained shall be the allocation percentage.

(c) If any such taxpayer believes that the methods of allocation or apportionment hereinbefore prescribed have [fol. 25n] operated or will so operate as to subject it to taxation on a greater portion of its net profits than is reasonably attributable to work done, services performed or rendered, and business or other activities conducted in the City, it shall be entitled to file with the Collector a statement of its objections and of such alternative method of allocation or apportionment as it believes to be proper under the circumstances and in such manner and with such detail and proof and within such time as the Collector may reasonably prescribe; and thereupon if the Collector shall conclude that the methods of allocation or apportionment hereinabove provided are in fact inapplicable or inequitable, he shall redetermine the net profits subject to tax by such other method of allocation or apportionment as seems best

calculated to assign to the City for taxation the portion of the net profits reasonably attributable to work done, services performed or rendered, and business or other activities conducted in the City, not exceeding, however, the amount which would be arrived at by the application of the methods of allocation or apportionment hereinabove provided.

Section Four. The earnings subject to tax of any non-resident individual, in any case in which the work done, services performed or rendered, and business or other activities conducted are done, performed, rendered or conducted both within and without the City, shall be ascertained as follows, to-wit:

(a) If the amount of such earnings depends on the volume of business transacted by such individual, then the portion of such earnings subject to tax shall be the portion of such earnings which the volume of business transacted by such individual in the City bears to volume of business transacted by him within and without the City.

(b) In all other cases, the portion of such earnings subject to tax shall be the portion of such earnings which the total number of working days employed within the City bears to the total number of working days within and without the City.

(c) If it is impracticable to apportion such earnings as aforesaid either because of the peculiar nature of the services of such individual, or on account of the unusual basis of compensation, or for any other reason, then the amount of such earnings reasonably attributable to work done, or services performed or rendered, in the City, shall be determined in accordance with rules or regulations adopted or promulgated by the Collector for the purpose.

Section Five. Except as hereafter provided each individual, association, business, corporation, fiduciary, or other entity, whose earnings or profits are subject to the tax im- [fol. 25o] posed by this ordinance shall, on or before March 30th of each year, unless an extension is granted by the Collector, make and file with the Collector a return, on a form obtainable from the Collector, setting forth the aggregate amount of salaries, wages, commissions, compensation or net profits earned by such taxpayer during the

preceding calendar year and subject to the said tax, together with such other pertinent information as the Collector may require:

Provided, however, that where the return is made for a fiscal year different from a calendar year, the said return shall be made within ninety days from the end of the fiscal year, unless an extension is granted by the Collector. Such return shall also show the amount of the tax imposed by this ordinance on such earnings and profits. The taxpayer making the said return shall, at the time of filing thereof, pay to the said Collector the amount of tax shown as due thereon:

Provided, however, that where any portion of the tax so due shall have been deducted at the source and shall have been paid to the Collector by the employer making the said deduction, credit for the amount so paid shall be deducted from the amount shown to be due, and only the balance, if any, shall be due and payable at the time of the filing of said return:

Provided, further, that no return shall be required of any taxpayer who has received only wages, salaries, commissions or other compensation and from which the tax has been withheld at the source, as hereinafter provided. The failure of any employer or any taxpayer to receive or procure a return form shall not excuse such employer or taxpayer from making a return or paying the tax due.

Section Six. Every employer within the City who employs one or more persons on a salary, wage, commission, or other compensation basis, shall deduct at the time of the payment thereof, the tax of one-half of one per centum of salaries, wages, commissions or other compensation due by the said employer to the said employee and subject to tax, and shall make his return monthly and pay to the said Collector, not later than the last day of each month, the amount of taxes so deducted for the calendar month next preceding the month in which the return is required to be filed. Said return shall be on a form or forms obtainable from the Collector and shall be subject to the rules and regulations prescribed therefor by the said Collector. Every such employer shall furnish each employee with a statement of the amount of the tax withheld. The failure

of any employer to deduct or withhold at the source the amount of the tax due from the employee shall not relieve the employee from the duty of making a return and paying the tax.

Section Seven. Every employer collecting and remitting the tax herein provided for on any resident or non-resident [fol. 25p] employee shall be entitled to deduct and retain three per centum of the total amout so collected as compensation to the employer for collecting and remitting the tax.

Section Eight. The income referred to in Sections 143.120 to 143.150, RSMo 1949, as not being subject to the state income tax shall not be taxable under this ordinance.

Section Nine. It shall be the duty of the Collector to collect and receive the tax imposed by this ordinance. In addition to keeping the records now required by law and paying over the proceeds from the collection of taxes to the treasurer of the City, as now provided by law, the Collector shall keep an accurate and separate account of all such tax payments received by him, showing the name and address of the taxpayer and the date of the payments. The Collector is hereby charged with the enforcement of the provisions of this ordinance and is hereby empowered to adopt and promulgate and to enforce rules and regulations relating to any matter or thing pertaining to the administration and enforcement of the provisions of this ordinance, including provisions for the re-examination and correction of returns and payments alleged or found to be incorrect or as to which an overpayment or underpayment is claimed or found to have occurred.

The Collector or any agent or employee authorized in writing by him is hereby authorized to examine the books, papers and records of any employer or supposed employer, or of any taxpayer or supposed taxpayer, in order to verify the accuracy of any return made, or if no return was made, to ascertain the tax imposed by this ordinance. Every such employer or supposed employer, or taxpayer or supposed taxpayer, is hereby directed and required to give to the said Collector or his duly authorized agent or employee

the means, facilities and opportunity for such examinations and investigations as are hereby authorized.

The Collector is hereby authorized to examine any person concerning any income which was or should have been returned for taxation and to this end may order the production of books, papers and records and the attendance of all persons before him, whether as parties or witnesses, whom he believes to have knowledge of such income. The refusal of such examination by any employer or taxpayer shall be deemed a violation of this ordinance. Any information obtained as a result of any return, investigation, hearing or verification required or authorized by this ordinance, shall be confidential except for official purposes and except in accordance with judicial order. Any person otherwise divulging such information shall, upon conviction thereof, be deemed guilty of a misdemeanor and shall be subject to [fol. 25q] a fine of not more than Five Hundred Dollars ($500.00) or imprisonment for not more than six (6) months or both such fine and imprisonment for each offense.

Section Ten. All taxes imposed by this ordinance and remaining unpaid after they have become due shall bear interest at the rate of six per cent (6%) per annum, and the delinquent taxpayer shall be liable for said tax and interest, and, in addition thereto, to a penalty of one per cent (1%) of the amount of the unpaid tax for each month or fraction of a month for the first six (6) months of delinquency.

Section Eleven. All taxes imposed by this ordinance, together with all interest and penalties, shall be recoverable by the City as other debts of like amounts are recoverable.

Section Twelve. Any person or taxpayer who shall fail, neglect or refuse to make any return required by this ordinance, or any employer who shall fail, neglect or refuse to withhold or pay over to the City any amount of tax subject to withholding hereunder, or any person or taxpayer who shall refuse to permit the Collector, or his duly authorized deputy or agent, to examine his books, records or papers, or who shall knowingly make an incomplete, false or fraudulent return, or who shall attempt to do anything

whatsoever to avoid the full disclosure of the amount of earnings or profits, shall be deemed guilty of a misdemeanor and shall be subject to a fine of not more than Five Hundred Dollars ($500.00) or to imprisonment for not more than six (6) months, or to both such fine and imprisonment.

Section Thirteen. If any sentence, clause or section or any part of this ordinance is for any reason held to be unconstitutional, illegal or invalid, such unconstitutionality, illegality or invalidity shall not affect or impair any of the remaining provisions, sentences, clauses, sections or parts of this ordinance. It is hereby declared to be the intent of the Board of Aldermen that this ordinance would have been adopted had such unconstitutional, illegal or invalid sentence, clause, section or part thereof not been included therein.

Section Fourteen. Article XIV of Chapter 23 of the Revised Code of the City of St. Louis, Missouri, 1948, is hereby repealed.

Section Fifteen. This being an ordinance fixing a tax rate, an emergency is hereby declared to exist within the meaning of Section 20 of Article IV of the Charter of the City of St. Louis, and this ordinance shall be effective immediately upon its passage and approval by the Mayor.

Approved: August 28, 1952.

[fol. 26] In Circuit Court of the City of St. Louis

Decree—February 5, 1953

Now this day this cause coming on for hearing on the pleadings and the agreed statement of facts heretofore filed and the Court having read and examined the pleadings and the agreed statement and considered the same and the briefs of the counsel herein filed, and being now fully advised in the premises, the Court finds and declares the law to be:

1. That the act of the 66th General Assembly of the State of Missouri, referred to in plaintiffs' petition as House

Bill No. 50, now appearing in Chapter 92 of the 1951 Supplement to the Revised Statutes of Missouri, 1949, as Sections 92.110 to 92.200, inclusive, is a general law applicable to the City of St. Louis; that it was not passed by the General Assembly in violation of Section 40, Paragraphs (21) and (30) of Article III, or Section 42 of Article III, or Section 11(f) of Article X of the Constitution of Missouri, and does not violate any of those provisions of the Constitution relating to local or special laws.

2. That the said act and the ordinance of the City of St. Louis numbered 46,222, adopted and ordained by the City of St. Louis pursuant to said act, did not and do not violate Section 3 of Article X or Section 10 of Article I of the Constitution of Missouri, and did not and do not violate the equal protection of the laws requirements of the 14th Amendment of the Constitution of the United States; that said ordinance and said act do not seek to levy and collect taxes that are not uniform upon the same class of subjects and not within the territorial limits of the City of St. Louis, and that said ordinance and said act are not arbitrary and discriminatory against wage earners as a class or the plaintiffs herein.

3. That said act was passed by the Senate of the General Assembly in accordance with and in compliance with Rule No. 44 of the Senate, and that said rule meets and satisfies the requirements of Section 22 of Article III of the Constitution of Missouri; that the Ways and Means Committee of the Senate to which said House Bill No. 50 was referred kept a record of its proceedings in connection with said bill in accordance with the requirements of Rule [fol. 27] 44 and that this record and the recorded vote of the members of the Committee was filed in the Senate with the report on said bill.

4. That the absence of any provision in the Charter of the City of St. Louis authorizing the adoption of said ordinance No. 46222 does not invalidate said ordinance for the reason that the General Assembly is authorized by Section 1 of Article X of the Constitution of Missouri to delegate the taxing power to the counties and other political subdivisions of the State and has granted power and authority to the City of St. Louis to adopt said Ordinance No. 46222 by the enactment of said House Bill No. 50.

5. That the said act and the said ordinance are not unconstitutional and void and are not in violation of the terms of the Constitution of the Sate of Missouri, as specifically alleged in plaintiffs' petition; that the City of St. Louis was not without authority to adopt said ordinance or to impose the earnings tax levied by said ordinance upon the plaintiff; that the said act of the Legislature and the said ordinance are not illegal and void for the reason that the enforcement of said ordinance would impose multiple taxation on the plaintiffs and other employees similarly situated, and that plaintiffs have failed to establish the allegation of their petition that said ordinance and said act known as House Bill 50 are arbitrary, unreasonable, discriminatory, vague and uncertain, and in violation of said Article I, Section 10, of said Constitution of Missouri and in violation of the due process and equal protection of the laws requirements of the 14th Amendment of the Constitution of the United States.

6. The court, having heretofore determined the issues relating to defendant Shapleigh Hardware Company by order entered the 26th day of January, 1953, hereby confirms said order.

[fol. 28] It is accordingly ordered, adjudged and decreed that the said act of the 66th General Assembly of the State of Missouri, referred to in plaintiffs' petition as House Bill No. 50, now appearing in Chapter 92 of the 1951 Supplement to the Revised Statutes of Missouri, 1949, as Sections 92.110 to 92.200, does not violate any of the aforesaid provisions of the Constitution of Missouri; and that Ordinance No. 46,222 is a lawful exercise by the City of St. Louis of the powers conferred by said law; and it is further ordered, adjudged and decreed that plaintiffs' prayer for injunctive relief be denied and that plaintiffs' petition and plaintiffs' cause of action be dismissed with prejudice to plaintiffs and that the defendants shall have and recover from plaintiffs their costs herein expended.

IN CIRCUIT COURT OF THE CITY OF ST. LOUIS

MOTION FOR NEW TRIAL—Filed February 10, 1953

Come now the plaintiffs in the above captioned cause and move the Court to grant them a new trial in the above entitled cause against all defendants, and for grounds for their motion plaintiffs state:

1) That the Court erred in finding and holding that the act of the 66th General Assembly of the State of Missouri, referred to in plaintiffs' petition as House Bill No. 50, now appearing in Chapter 92 of the 1951 Supplement to the Revised Statutes of Missouri, 1949, as Sections 92.110 to 92.200, inclusive, is a general law applicable to the City of St. Louis, and that it was not passed by the General Assembly in violation of Section 40, Paragraphs (21) and [fol. 29] (30) of Article III, or Section 42 of Article III, or Section 11 (f) of Article X of the Constitution of Missouri, and does not violate any of those provisions of the Constitution relating to local or special laws.

2) That the Court erred in finding and holding that the said act and the ordinance of the City of St. Louis numbered 46222, adopted and ordained by the City of St. Louis pursuant to said act, did not and do not violate Section 3 of Article X or Section 10 of Article I of the Constitution of Missouri, and did not and do not violate the due process and equal protection of the laws requirements of the Fourteenth Amendment of the Constitution of the United States: that the Court erred in finding and holding that said ordinance and said act do not seek to levy and collect taxes that are not uniform upon the same class of subjects and not within the territorial limits of the City of St. Louis, and that said ordinance and said act are not arbitrary and discriminatory against wage earners as a class or the plaintiffs herein.

3) The Court erred in finding and holding:

a) That said act was passed by the Senate of the General Assembly in accordance with and in compliance with Rule No. 44 of the Senate, and that said rule meets and satisfies the requirements of Section 22 of Article III of the Constitution of Missouri.

b) That the Ways and Means Committee of the Senate to which said House Bill No. 50 was referred kept a record of its proceedings in connection with said bill in accordance with the requirements of Rule 44 and that this record and the recorded vote of the members of the Committee was, within the purport and meaning of said Constitutional requirement, filed in the Senate with the report on said bill.

4) That the court erred in finding and holding that the absence of any provision in the Charter of the City of St. [fol. 30] Louis authorizing the adoption of said ordinance No. 46222 does not invalidate said ordinance for the reason that the General Assembly is authorized by Section 1 of Article X of the Constitution of Missouri to delegate the taxing power to the counties and other political subdivisions of the State and has granted power and authority to the City of St. Louis to adopt said Ordinance No. 46222 by the enactment of said House Bill No. 50.

5) That the Court erred in finding and holding:

a) That the said act and the said ordinance are not unconstitutional and void and are not in violation of the terms of the Constitution of the State of Missouri, as specifically alleged in plaintiffs' petition.

b) That the City of St. Louis was not without authority to adopt said ordinance or to impose the earnings tax levied by said ordinance upon the plaintiffs.

c) That the said act of the Legislature and the said ordinance are not illegal and void for the reason that the enforcement of said ordinance would impose multiple taxation on the plaintiffs and other employees similarly situated.

d) That plaintiffs have failed to establish the allegation of their petition that said ordinance and said act known as House Bill 50 are arbitrary, unreasonable, dicriminatory, vague and uncertain, and in violation of said Article I, Section 10, of said Constitution of Missouri and in violation of the due process and equal protection of the laws requirements of the Fourteenth Amendment of the Constitution of the United States.

6) That the Court erred in entering its order of the 26th day of January, 1953, relating to defendant Shapleigh Hardware Company, and in confirming said order.

[fol. 31] 7) That the Court erred in ordering, adjudging and decreeing that the said act of the 66th General Assembly of the State of Missouri, referred to in plaintiffs' petition as House Bill No. 50, now appearing in Chapter 92 of the 1951 Supplement to the Revised Statutes of Missouri, 1949, as Sections 92.110 to 92.200, does not violate any of the aforesaid provisions of the Constitution of Missouri, and that Ordinance No. 46222 is a lawful exercise by the City of St. Louis of the powers conferred by said law; and that the Court further erred in ordering, adjudging and decreeing that plaintiffs' prayer for injunctive relief be denied and that plaintiffs' petition and plaintiffs' cause of action be dismissed with prejudice to plaintiffs.

8) That the judgment is against the law.

9) That the judgment is against the evidence.

10) That the judgment is against the law and the evidence and the law under the evidence.

11) That the judgment is for the wrong party.

Wherefore, for the reasons stated, plaintiffs respectfully move this Honorable Court to grant them a new trial in this cause.

In Circuit Court of the City of St. Louis

Note Re Order Overruling Motion for New Trial and Notation of Appeal—Feb. 12, 1953

And, on the 12th day of February, 1953, said court entered its order overruling said joint motion for new trial, and thereafter on the 13th day of February, 1953, and within the time allowed by law, plaintiffs-appellants filed their notice of appeal and deposited with the Clerk of the Circuit Court the sum of $10 as docket fee in this appeal to the Supreme Court. Receipt of said notice of appeal was acknowledged by respondents in open court, [fols. 32-33] said notice of appeal and acknowledgment of service being in words and figures as follows:

In Circuit Court of the City of St. Louis

[Title omitted]

Notice of Appeal—February 13, 1953

Notice hereby given that Frank Walter and Edward Williams, Jr., plaintiffs above-named, hereby appeal to the Supreme Court of Missouri from the final judgment and overruling of their Motion for New Trial entered in this action on the Fifth day of February, 1953, upon the overruling by the court of the plaintiffs' motion for a new trial, entered February 12, 1953.

Stanley M. Rosenblum, Attorney for Plaintiffs, Address 408 Olive Street.

Dated February 13, 1953.

[fol. 34] In the Supreme Court of Missouri, Court En Banc, April Session, 1953

No. 43,648

Frank Walters and Edward Williams, Jr., Appellants,

vs.

City of St. Louis, a Municipal Corporation; Joseph M. Darst, Mayor of the City of St. Louis; and Del L. Bannister, Collector of the City of St. Louis, Missouri, and Director of the Collection Division of the Department of Finance of the City of St. Louis, Missouri, Respondents

Appeal from the Circuit Court of the City of St. Louis, Division No. 2, Honorable William B. Flynn, Judge

Opinion—Filed June 8, 1953

This action involves the constitutionality of Ordinance No. 46,222 of the City of St. Louis, commonly called and herein referred to as the "earnings tax" ordinance. The trial court upheld its constitutionality and plaintiffs appealed.

Appellants, one a resident of the City and the other a resident of St. Louis County, are wage compensated employees of the Shapleigh Hardware Company, a corporation domiciled and doing business in the City. Since the enactment of the ordinance and pursuant to its provisions, the employer has withheld and unless the ordinance is declared invalid will continue to withhold from their wages as they accrue one-half of one per centum thereof for disbursement to the City in discharge of the tax levied upon their wages under said ordinance. The petition, which names the City, its Mayor, its Collector, and Shapleigh Hardware Company as defendants, prays a judgment declaring the ordinance void, declaring the act of the Legislature which authorized its enactment void, and enjoining the defendants from carrying the ordinance into effect. It appearing to the trial court after submission that no issue was presented [fol. 35] as to Shapleigh Hardware Company, it was conditionally dismissed from the action.

The grounds upon which plaintiffs sought judgment declaring the ordinance void and upon which they assign error of the trial court in refusing to so hold are:

(1) The enabling act of the 66th General Assembly upon which the ordinance is predicated, to wit: House Substitute for House Bill No. 50, now §§ 92.110-92.200 RSMo 1949 V. A. M. S., is violative of the following provisions of the Constitution of Missouri:

(a) Article III, § 40, prohibiting the enactment of local or special laws in the instances set forth in clauses (21) and (30) thereof;

(b) Article X, § 11(f), authorizing enactment of general laws permitting a county or other political subdivision to levy taxes other than whose ad valorem; and

(c) Said House Bill No. 50 was not enacted in compliance with Article III, § 22, requiring each committee of the House and Senate to which a bill is referred to keep a record of its proceedings and report the vote of its members to be filed with all reports thereon.

(2) The ordinance and said House Bill No. 50 are arbitrary, unreasonable, discriminatory, vague and therefore violative of the due process clause of the Constitution of

Missouri, to wit: Article I, § 10; of the due process and equal protection clauses of the Constitution of the United States, to wit: the Fourteenth Amendment thereof; and of Article X, § 3, of the Constitution of Missouri, requiring that taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax and shall be levied and collected by general laws.

On the 19th day of May, 1950, the Board of Aldermen of the City of St. Louis adopted a resolution stating in part:

"We * * * do hereby take official recognition of the impending financial crisis confronting the City of St. Louis.

"Whereas, the cost of government in the City of St. Louis has increased from approximately $20,000,000 to $40,000,000 [fol. 36] in the last ten years, and the ordinary sources of taxation have not been sufficient to meet this increase in the cost of municipal government, and it has heretofore been necessary to enact an earnings tax in the City of St. Louis for the maintenance of the solvency of our local government; and

"Whereas, the General Assembly of the State of Missouri has heretofore enacted enabling legislation authorizing the City of St. Louis to levy an earnings tax which has been productive of approximately $7,000,000 per year, and the authority heretofore granted by the said General Assembly expires on July 17, 1950, and that thereafter the City of St. Louis will not have authority to continue this vital source of income; and

"Whereas, the loss of the aforesaid income would necessarily result in a curtailment of City services, thus endangering the health, welfare and safety of our citizens.

"Now, Therefore, Be It Resolved, that we * * * do hereby urge the Honorable Forrest Smith, Governor of the State of Missouri, to call a special session of the General Assembly for the purpose of continuing the authorization of this City to levy an earnings tax, and we further request the members of the General Assembly of the State of Missouri to act favorably upon said proposed legislation; * * * *."

The City of St. Louis is a constitutional charter city, having a population of more than 700,000 inhabitants as determined by the decennial census of 1950. Organized

under Article IX, §§ 20-26, Constitution of 1875, in the dual character of both a city and county, it has the unique distinction of being the only city specifically named in the Constitution of 1945, Article VI, § 31. It is also agreed that, although possible, it is a practical certainty no other such constitutional charter city of more than 700,000 inhabitants will come into existence in Missouri during the period of time in which House Bill No. 50 is effective.

(Although not specifically named in the Constitution of 1945, Kansas City was and still is a constitutional charter [fol. 37] city, and, subsequent to the adoption of the 1945 Constitution, University City, Columbia, Springfield, and possibly others, have framed and adopted their own charters. Section 82.010 RSMo 1949 V. A. M. S. recognizes their status in that respect along with that of the City of St. Louis.)

In its dual capacity as a city and county, the expenditures of the City of St. Louis for the fiscal year 1943-1944 amounted to $21,752,165, and its expenditures in said dual capacity in the fiscal year 1951-1952 amounted to $43,052,595. Established sources of revenue, absent an earnings tax, or an increase of other taxes, or a levy of additional taxes, are insufficient to meet the requirements of appropriations as passed by the Board of Aldermen. In the fiscal year 1951-1952 the operating deficit amounted to $3,307,138. The enabling act approved by the Governor on the 28th day of May, 1948, authorizing the City to levy a tax on earnings for the period ending July 17, 1950, and the tax levied pursuant to said act of 1948, yielded a tax during the two-year period of the existence of said ordinance amounting to $12,906,085, and during the two years said tax was in effect the City was able to operate without a deficit.

The enabling act here involved, hereinafter referred to as House Bill No. 50, became effective (unless held to be unconstitutional) on July 29, 1952. Insofar as pertinent, it provides:

§ 92.110. "Any constitutional charter city in this state which now has or may hereafter acquire a population in excess of seven hundred thousand inhabitants, according to the last federal decennial census, is hereby authorized to levy and collect, by ordinance for general revenue purposes,

an earnings tax on the salaries, wages, commissions and other compensation earned by its residents; on the salaries, wages, commissions and other compensation earned by non-residents of the city for work done or services performed or rendered in the city; on the net profits of associations, businesses or other activities conducted by residents; on the net profits of associations, businesses or other activities conducted in the city by non-residents; and on the net [fol. 38] profits earned by all corporations as the result of work done or services performed or rendered and business or other activities conducted in the city."

§ 92.120. Such tax shall not be in excess of one per centum per annum.

§ 92.150. "The net profits or earnings of associations, businesses or other activities, and corporations shall be ascertained and determined by deducting the necessary expenses of operation from the gross profits or earnings."

§ 92.200. The act shall expire April 1, 1954.

Appellants thus state their first contention:

"The gravamen of appellants' charge that House Bill No. 50 is unconstitutional is found in those provisions of our Constitution of 1945 prohibiting special legislation, namely, Article III, Section 40, sub-paragraphs 21 and 30, and Article X, Section 11(f). Simply stated, appellants submit that the classification of constitutional charter cities by population according to the last federal decennial census when read with the final section of the act causing it to expire April 1, 1954, six years before the next federal decennial census, makes the act applicable only to the City of St. Louis under a then existing state of facts and by its very terms fails to hold the class open so that other constitutional charter cities might come within it. This requirement that a statute be "open-ended" in order to avoid the constitutional prohibition against special legislation is well-settled in Missouri; and this fundamental requisite of a general law—its "open-endedness"—is as applicable to the City of St. Louis as to any other political subdivision in this state."

Respondents' answer to this contention is that Article VI, § 31, of the Constitution of 1945, classifying the City

of St. Louis in its dual capacity of city and county and affirming its powers, organization, rights and privileges, being special in its terms, prevails over the general provisions of Article III, § 40, prohibiting the General Assembly from passing any local or special law (clause 21) regulating the affairs of counties and cities, or (clause 30) where a general law can be made applicable.

[fol. 39] Respondents' contention fails, however, to take into consideration the provisions of Article X, § 11(f), of the Constitution, which is as follows: "Nothing in this constitution shall prevent the enactment of any *general law* permitting any county or other political subdivision to levy taxes other than ad valorem taxes for its essential purposes." (Emphasis ours.) By the clear implication of that provision, legislative permission to any city or other political subdivision to enact an earnings tax ordinance can only be granted by a general law. We can attach no other meaning to it. Of course, this does not mean that a general law permitting the levy of such a tax would be local or special because it was operative only in the City of St. Louis, provided it was prospective in its terms so as to become operative in other cities as they come within the classification therein specified. State ex rel. Zoological Board of Control v. City of St. Louis, 318 Mo. 910, 1 S. W. 2d 1021, 1027; State ex rel. Carpenter v. City of St. Louis, 318 Mo. 870, 2 S. W. 2d 713, 718.

Appellants concede the law to be as above stated. They assert, however, that even though House Bill No. 50 purports in the first section thereof (92.110) to be applicable to "any constitutional charter city in this state which now has or may hereafter acquire a population in excess of seven hundred thousand inhabitants, according to the last federal decennial census * * *," yet § 92.200 fixing the expiration date of the act at April 1, 1954, is destructive of the recital in the first section and makes the act applicable only to the City of St. Louis under the existing state of facts, and thereby prevents any other constitutional charter city which hereafter may attain a population of 700,000 from the benefit of its provisions.

In support of their position they rely upon the case of Reals v. Courson, 349 Mo. 1193, 164 S. W. 2d 306. One of the grounds upon which the statute there under considera-

tion was declared unconstitutional unquestionably supports appellants' position in the instant case. However, a re-examination of the Reals case has convinced us that although we were correct in holding the statute there involved unconstitutional upon another ground therein discussed, [fol. 40] we erred in holding it unconstitutional upon the ground above asserted. (It perhaps should be here stated that the ground upon which we base this conclusion was not advanced in the submission of that case.)

That case involved a statute enacted in 1941. It authorized the boards of directors of school districts, formed of cities and towns in counties having more than 200,000 inhabitants and less than 450,000 inhabitants, * * * to issue school bonds. The last section thereof provided that the act should expire January 1, 1946. St. Louis County then was the only county in the State within the range of that classification; and it was, as in the instant case, a practical certainty that no other county would come within that classification during the period in which the statute was to be effective. One of the grounds upon which we held the statute unconstitutional was that the classification therein made was unreasonable and arbitrary in that there were other counties containing school districts similarly situated to which a general law could have been made applicable. As stated, we are convinced the case was soundly ruled on that ground.

But we further said, l.c. 309: "Therefore, we have a legislative enactment classifying counties and thereby school districts so that the act can only apply to the counties —in this instance the county, which on the day of its enactment had the requisite population of more than 200,000 and less than 450,000 inhabitants. It can apply to an existing state of facts only, that is to the one county in Missouri then falling within the classification and therefore, in fact, cannot be said to have created a future class into which other counties might fall." (Cases cited.)

The trouble with the conclusion above quoted is that it denies the well established rule of "open-endedness" to legislation pertaining to cities (or counties or other subdivisions) of a specified classification when it appears with reasonable certainty that no other city (or political sub-

division) will come within the classification during the term of the legislation when the term thereof is of limited duration. To so rule would deny to the General Assembly the right to authorize for a limited period of time the City [fol. 41] of St. Louis to enact an emergency earnings tax ordinance likewise so limited solely because its population was so far in excess of that of any other city that none would come within the classification during the emergency. We think the Constitution does not sanction such discrimination. The fact that a statute is limited as to the time of its duration does not make it local or special so long as it applies to all within, or that may come within, the enumerated class during its effective period. State ex rel. Attorney General v. Lee, 193 Ark. 270, 99 S. W. 2d 835; 50 Am. Jur., Statutes, §§ 514, 515, p. 525. The act here under consideration does precisely that.

All of the cases cited in support of the conclusion reached in the Reals case deal with legislative acts that are to continue in perpetuity unless repealed. They are soundly ruled. It is obvious that limitation of the operation of an act that is to continue in perpetuity to a certain city or cities then comprising a specified classification without leaving it open to operate upon all cities thereafter attaining the same classification, thereby resulting in the possibility of the act becoming applicable to some one or more, but not all, of the same classification, would be to deprive the latter of its benefits. Such an act would run afoul of the rule we long since adopted in this State: "A statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special." Reals v. Courson, 349 Mo. 1193, 164 S. W. 2d 306, 307, 308, and cases cited therein.

In the instant case, we are dealing with an entirely different type of legislation: legislation of limited duration. By its terms, the enabling act here involved is operative upon any constitutional charter city in this State that now has or may hereafter acquire a population of more than 700,000 prior to its expiration date of April 1, 1954. The conceded fact that it is a practical certainty no other city in this State will attain a population of more than 700,000 prior to the expiration date of the act, April 1, 1954, does not in the least affect the situation. The act still does not exclude

any city that *may* come within the classification therein [fol. 42] made during its effective existence; to the contrary, it expressly includes any such city. It therefore applies to all cities of more than 700,000 population, whether there be one or many, so long as it is effective, and does not offend against the rule. Consequently, the Reals case should no longer be followed insofar as it is in conflict herewith. Appellants' contention of unconstitutionality of House Bill No. 50 in the foregoing respects must be overruled.

The next assignment deals with the last sentence of Article III, § 22, of the Constitution, reading: "Each committee [to which a bill has been referred] shall keep such record of its proceedings as is required by rule of the respective houses and this record and the recorded vote of the members of the committee shall be filed with all reports on bills."

Following the adoption of the Constitution, the Senate adopted a rule implementing the above provision, and which in the 66th General Assembly was designated as Rule 44, reading as follows: "Each committee shall keep a record of the total number of members present when a bill is finally considered; and this record and the record of the total number voting favorably and the total number voting unfavorably on said bill, shall be filed by the committee with its report (Constitution, Art. III, Sec. 22." It is stipulated that the report of the Ways and Means Committee of the Senate to which House Bill No. 50 was referred was made in the same manner as the reports of the several committees of the several sessions of the 63rd, 64th, 65th and 66th General Assemblies on all bills passed at each session thereof, and that such is the procedure now followed.

The report on House Bill No. 50 showed the vote thereon as follows: "Members present: 10; Members voting aye: 9; Members voting no: 0; Members not voting: 1."

Appellants insist that the report as made is insufficient in that it does not set forth the names of the individual members and how each of them voted. In support of that contention they cite many cases in an effort to establish [fol. 43] that the provisions of said Sec. 22 are mandatory and quote extended excerpts from the debates on this section during the Constitutional Convention in an effort to establish that the construction they place upon the

meaning of § 22 is its intendment. Respondents cite cases and quote excerpts from the debates in an effort to establish the contrary of both contentions made by appellants. No good purpose would be served in a discussion of these cases or debates. This, for the reason that the provision simply does not require the recording of the vote of each of the members. This court would be going far afield in interpolating into the provision language that is not there and then declaring it mandatory. No one can say that the construction placed thereon by the Senate is not a literal compliance with its provisions. This point must be ruled against appellants.

This brings us to appellants' contention that the ordinance and House Bill No. 50 are unreasonable, discriminatory and uncertain and therefore violative of (a) the due process clause of the Constitution of Missouri, (b) the due process and equal protection of the laws clauses of the Federal Constitution, and (c) the requirement of uniformity of taxes levied upon the same class of subjects within the territorial limits of the levying authority.

Section Two of the ordinance imposes the tax of one-half of one per centum on (a) the salaries, wages, commissions and other earned compensation of individuals and on (b) the net profits of corporations, associations and businesses. "Net profits" are defined in Section One thereof as "the net income of any association, business or corporation remaining after deducting the necessary expenses of operation from the gross profits or earnings." Section Nine thereof charges the city collector with the enforcement of the ordinance and empowers him to adopt, promulgate and enforce "rules and regulations relating to any matter or thing pertaining to the administration and enforcement of the provisions of the ordinance * * *." Pursuant thereto, he promulgated and published in pamphlet form, under date of August 28, 1952, a set of rules and regulations. In the foreword attached thereto, it is [fol. 44] stated: "This first issue of the rules and regulations, which is flexible, is *intended as a guide* to those subject to the Earnings Tax and will be supplemented from time to time as may be necessary." (Emphasis ours.)

Among the rules so adopted was a definition of the meaning of the term "net profits." It declared, as does

House Bill No. 56, "net profits" to be the net income of any association, business or corporation remaining after deducting the necessary expenses of operation from the gross profits or earnings. It then authorized the following deductions from gross profits or earnings in determining "net profits": (1) ordinary and necessary expenses of conducting the business; (2) all losses, including reasonable allowances for exhaustion, depreciation, obsolescence or wear and tear; (3) bad debts arising and charged off during taxable year; (4) all taxes except those for local benefits and on inheritances; (5) all interest paid within the year on taxpayer's indebtedness; and (6) charitable contributions not in excess of 5% of net income.

In launching their attack upon this phase of the ordinance, appellants assume that the rules promulgated by the collector are to be treated as a part and parcel of the ordinance. If they are to be so treated, the result is that the ordinance will become void whenever the city collector, through ignorance, excessive zeal or sheer venality, promulgates a rule that is discriminatory, vague or uncertain. While it is true that he is authorized to make rules relating to "any matter or thing pertaining to the administration and enforcement" of its provisions, certainly he is not thereby impliedly empowered to make any rule that will invalidate the ordinance.

Furthermore, this action does not seek to have the ordinance declared unconstitutional because of any administrative or enforcemental rule adopted. A careful reading of the petition fails to disclose any mention of the rules other than that the ordinance "attempts to empower the defendant collector * * * to promulgate necessary rules and regulations for the administration of the tax, and authorizing every employer collecting or remitting the tax to deduct and retain therefrom three per cent of the total [fol. 45] amount withheld * * *." No where in the charging part or in the prayer of the petition is any complaint leveled against or relief sought on account of the rules. But appellants say the case was tried upon that theory and cite as authority for their assertion the agreed statement of facts, wherein a recital is made as to the adoption of the ordinance and promulgation of rules, and that a "copy of said ordinance and said pamphlet is hereto

attached, * * * incorporated herein by reference, pursuant to which ordinance and enabling act defendant Del L. Bannister [collector] claims the funds withheld from the wages of plaintiffs by defendant Shapleigh Hardware Co."

We are clearly of the opinion that such a recital in the agreed statement of facts cannot inject into the case an issue that is wholly foreign to the whole theory upon which the action is predicated and pleaded.

However, we are convinced that a mere misconception, if such it be, on the part of the collector at the time he issued the first set of rules defining his idea of what constituted allowable deductions in reckoning "net profits," or a vague statement therein, whereby some advantage might accrue to a business institution or self-employed individual as against a wage earner, could not invalidate the ordinance. The rules, at most, purport to be no more than a guide. See City of Louisville v. Sebree, 308 Ky. 420, 214 S. W. 2d 248, 255; Sutherland's Statutory Construction, 3rd Ed., Vol. 2, § 2405, p. 180. For instance, it would be wholly unreasonable to declare unconstitutional a state statute because an administrative agency promulgated a discriminatory rule in attempting to enforce it. Likewise, so would it be to declare an ordinance void on the same basis.

Is the classification of those subject to the provisions of the act into two groups, to wit: (1) those in business for themselves and (2) wage earners, arbitrary and unreasonable?

Appellants concede, as they must, that a state may make such classifications even though they result in the imposition of unequal taxes on the various classes, provided the classifications are reasonably related to the ends the statute [fol. 46] seeks to achieve, citing Caskey Baking Co. v. Commonwealth of Virginia, 313 U. S. 117, 61 S. Ct. 881, 85 L. Ed. 1223; Nashville, C. & St. L. Ry. v. Browning, 310 U. S. 362, 60 S. Ct. 968, 84 L. Ed. 1254; Madden v. Commonwealth of Kentucky, 309 U. S. 83, 60 S. Ct. 406, 84 L. Ed. 590. They contend, however, the classification here made is unreasonable and arbitrary and, in so doing, rely strongly upon the cases of Quaker City Cab Co. v. Commonwealth of Pennsylvania, 277 U. S. 389, 48 S. Ct. 553, 72 L. Ed. 927, and City of St. Louis v. Spiegel, 75 Mo. 145.

In the Quaker City Cab case, the statute involved levied

a tax upon the gross receipts of "every transportation company, now or hereafter incorporated or organized" under the laws of any sovereignty and doing business in Pennsylvania, owning or operating any railroad or other device for the transportation of freight or passengers. The Quaker Company, a New Jersey corporation, operated a fleet of taxicabs in Pennsylvania. In so doing, it was subjected to competition by individuals and partnerships operating taxicabs. The court held the act violative of the Fourteenth Amendment, saying: "In effect section 23 divides those operating taxicabs into two classes. The gross receipts of incorporated operators are taxed, while those of natural persons and partnerships carrying on the same business are not. The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed." The syllabus in the Spiegel case fairly summarizes the nature of the case and its holding: "A license fee upon the keepers of meatshops is a tax, and must be uniform within the territorial limits of the authority imposing it. Const. 1875, Art. 10, § 3. A city ordinance, therefore, which requires a license fee of $100 in one part of the city and $25 in the rest, is void."

It is clear there is no analogy between the classifications in those cases and the instant case. In those cases there [fol. 47] was patent discrimination between taxpayers of the same class, to wit: those engaged in identical occupations. Other cases cited by appellants, far too numerous to separately discuss, are found not to be in point.

In determining the reasonableness of the classification made by the ordinance here involved, certain established rules of construction are pertinent:

"Classification is not discrimination. It is enough that those in the same class are treated with equality." Caskey Baking Co. v. Commonwealth of Virginia, 313 U. S. 117, 61 S. Ct. 881, 883, 85 L. Ed. 1223. See also: State ex rel. Jones v. Nolte, 350 Mo. 271, 282, 165 S. W. 2d 632, 636; Campbell Baking Co. v. City of Harrisonville, 50 F. 2d

670, 673; City of St. Charles ex rel. Palmer v. Schulte, 305 Mo. 124, 129, 130, 264 S. W. 654, 655, 656.

In Madden v. Commonwealth of Kentucky, 309 U. S. 83, 60 S. Ct. 406, 84 L. Ed. 590, the court said: "The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. This Court fifty years ago concluded that 'the fourteenth amendment was not intended to compel the states to adopt an iron rule of equal taxation,' and the passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable [fol. 48] basis which might support it." See also Hull v. Baumann, 345 Mo. 159, 131 S. W. 2d 721, 726.

In the case of Dole v. City of Philadelphia (1940), 337 Pa. 375, 11 A. 2d 163, the Supreme Court of Pennsylvania had under consideration an ordinance similar to the ordinance here involved. That ordinance imposed a tax on (a) salaries, wages, commissions and other earned compensations, and (b) on the net profits of businesses, professions or other activities. In discussing that feature of the ordinance, the court said: "Furthermore, salaries and wages are in their nature essentially certain, and free from the speculative features inevitably attached to net profits. A business or professional man at the end of a year of industrious work may find that his efforts have produced no net income,—only a loss. In another year his net profit may be tremendous. The salaried man or wage earner proceeds on a more even keel. He usually knows in advance

of performance just how much his salary or wage will be. Also, he knows currently what he is earning, while the business or professional man generally calculates his net profit or loss on an annual basis. He has to operate and calculate on a long range basis. Many of our laws for the benefit of employees are based upon these, and other fundamental and universally recognized, differences between the earning position of an employee and that of a business or professional man depending, not on salary, but on net profits for his livelihood."

A more recent case upholding a similar classification is the case of City of Louisville v. Sebree (1948), 308 Ky. 420, 214 S. W. 2d 248.

It is clear that the ordinance in the instant case deals with two distinct subjects of taxation and with two broad and distinct classes of taxpayers. One deals with "salaries, wages, commissions and other compensation," for which the individual earner is liable. The other deals with "net profits" of those in business for themselves, for which they are liable. Within each class there is no discrimination. No sound reason has been advanced to show such classification [fol. 49] unreasonable. We hold the ordinance valid in this respect.

Finally, appellants say that the term "net profits," as defined in the ordinance, is so uncertain that the legislative intent can only be gathered from the collector's regulations. We cannot agree. Section One of the ordinance defines "net profits" as "the net income of any association, business or corporation remaining after deducting the necessary expenses of operations from the gross profits or earnings." It is substantially in the wording, and has the identical meaning, of the definition of "net profits" set forth in House Bill No. 50. The meaning is clear and definite. The problem of what constitutes "necessary expenses of operation" is, and perhaps always will be, vexing. It is a matter of common knowledge that the concept of the meaning of this phrase changes from time to time as accepted methods of accounting change. In any event, however, for the reasons hereinabove stated, the question of whether the rules promulgated by the collector in an effort to provide a uniform method of determining "net profits"

are discriminatory is not before us. Appellants' final point is therefore overruled.

The judgment of the trial court is affirmed.

Frank Hollingsworth, Judge.

All concur.

[fol. 50] [File endorsement omitted]

IN THE SUPREME COURT OF MISSOURI

[Title omitted]

PETITION FOR APPEAL—Filed September 3, 1953

Considering themselves aggrieved by the final decree and judgment of this Court entered on July 13, 1953, plaintiffs herein do hereby pray that an appeal be allowed to the Supreme Court of the United States from said final decree and judgment and from each and every part thereof; that citation be issued in accordance with law, and that the amount of security be fixed by the order allowing the appeal, and that the material parts of the record proceedings and papers upon which said final judgment and decree was based duly authenticated be sent to the Supreme Court of the United States in accordance with the rules in such cases made and provided.

Respectfully submitted, Stanley M. Rosenblum, A. Clifford Jones, Counsel for Plaintiffs-Appellants.

[fol. 51] IN THE SUPREME COURT OF MISSOURI

[Title omitted]

ORDER ALLOWING APPEAL—September 3, 1953

Frank Walters and Edward Williams, Jr. having made and filed their petition praying for an appeal to the Supreme Court of the United States from the final judgment and decree of this Court in this cause entered on July 13, 1953, and from each and every part thereof, and having

presented their assignment of errors and prayer for reversal and their statement as to the jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided.

Now, therefore, it is hereby ordered that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of $500.00, with good and sufficient surety, and shall be conditioned as may be required by law.

It is further ordered that citation shall issue in accordance with law.

Roscoe P. Conkling, Judge.

September 3, 1953.

[fol. 52] Citation in usual form showing service on Charles J. Dolan omitted in printing.

[fol. 53] In the Supreme Court of Missouri

[Title omitted]

Assignment of Errors and Prayer for Reversal—Filed September 3, 1953

Frank Walters and Edward Williams, Jr., plaintiffs-appellants in the above entitled cause, in connection with their appeal to the Supreme Court of the United States, hereby file the following assignment of errors upon which they will rely in their prosecution of said appeal from the final judgment of the Supreme Court of Missouri entered on July 13, 1953.

The Supreme Court of Missouri erred:

1) In holding and concluding that the classification in House Bill No. 50 and Ordinance 46222 taxing gross income to wage earners and "net profits" to self-employed persons is not arbitrary and unreasonable as against appellants-wage earners, and thereby not unconstitutional and

violative of the due process and equal protection of the laws requirements of the Fourteenth Amendment to the Constitution of the United States.

2) In holding and concluding that the term "net profits" as defined in Ordinance 46222 is not so vague and uncertain as to render said Ordinance unconstitutional and violative of the due process requirements of the Fourteenth Amendment to the Constitution of the United States.

3) In holding and concluding that an Ordinance is not void and constitutionally violative of the equal protection of the laws requirements of the Fourteenth Amendment to the Constitution of the United States because an administrative officer promulgated a discriminatory regulation and sought to enforce said Ordinance under said discriminatory [fol. 54] regulation.

4) In holding and concluding that despite evidence in the record of the discriminatory administration of the Ordinance against appellants, the denial of the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States was not properly before it and, therefore, said Ordinance could not be held unconstitutional as violative of said Amendment.

Wherefore, plaintiffs-appellants pray that the final judgment of the Supreme Court of Missouri be reversed and for such other relief as the Court may deem fit and proper.

Stanley M. Rosenblum, A. Clifford Jones, Counsel for Plaintiffs-Appellants.

[fol.55] Statement Required by Paragraph 2, Rule 12 of the Rules of the Supreme Court of the United States (omitted in printing).

[fol. 56] Certificate of Service (omitted in printing).

[fol. 57] IN THE SUPREME COURT OF MISSOURI

[Title omitted]

MOTION TO RECALL MANDATE AND RULING THEREON—
September 3, 1953

Come now appellants and respectfully state to this Honorable Court:

1) That on the 13th day of July, 1953, appellants' Motion for Rehearing heretofore filed in this cause was denied by this Court and final judgment entered, and that fifteen days thereafter the mandate in this cause was sent down to the trial court.

2) That appellants are applying for a Writ of Appeal to the Supreme Court of the United States and intend to prosecute said appeal.

Wherefore, appellants respectfully move this Honorable Court forthwith to recall said mandate and for a stay of said mandate for ninety (90) days from the date of denial of appellants' motion for Rehearing.

Stanley M. Rosenblum, A. Clifford Jones, Counsel for Appellants.

Sustained. Roscoe P. Conkling. Sept. 3, 1953.

[fols. 58-59] Praecipe (omitted in printing).

[fol. 60] Clerk's Certificate to foregong transcript omitted in printing.

[fol. 61] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1953

[Title omitted]

APPELLANTS' STATEMENT OF POINTS TO BE RELIED UPON—
Filed October 15, 1953

Frank Walters and Edward Williams, Jr., appellants in the above entitled cause, in connection with their appeal to the Supreme Court of the United States and in accordance with Supreme Court Rule 13, hereby file the following statement of the points upon which they will rely in their prosecution of said appeal from the final judgment of the Supreme Court of Missouri entered on July 13, 1953.

1) The Supreme Court of Missouri erred in holding and concluding that the classification in House Bill No. 50 and Ordinance 46222 taxing gross income to wage earners and "net profits" to self-employed persons is not arbitrary and unreasonable as against appellants-wage earners, and thereby not unconstitutional and violative of the due process and equal protection of the laws requirements of the Fourteenth Amendment to the Constitution of the United States.

2) The Supreme Court of Missouri erred in holding and concluding that the term "net profits" as defined in Ordinance 46222 is not so vague and uncertain as to render said Ordinance unconstitutional and violative of the due process requirements of the Fourteenth Amendment to the Constitution of the United States.

3) The Supreme Court of Missouri erred in holding and concluding that an Ordinance is not void and constitutionally violative of the equal protection of the laws requirements [fol. 62] of the Fourteenth Amendment to the Constitution of the United States because an administrative officer promulgated a discriminatory regulation and sought to enforce said Ordinance under said discriminatory regulation.

4) The Supreme Court of Missouri erred in holding and concluding that despite evidence in the record of the discriminatory administration of the Ordinance against appellants, the denial of the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States was not properly before it and, therefore,

said Ordinance could not be held unconstitutional as violative of said Amendment.

Respectfully submitted, Harry H. Craig, Stanley M. Rosenblum, Counsel for Plaintiffs-Appellants, 408 Olive Street, St. Louis 2, Missouri. CHestnut 8465.

[fol. 63] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

[Title omitted]

APPELLANTS' DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed October 15, 1953

Frank Walters and Edward Williams, Jr., appellants in the above entitled cause, in accordance with Supreme Court Rule 13, hereby designate the following parts of the record to be printed:

1) The Amended Petition.
2) The Amended Answer.
3) The Agreed Statement of Facts.
4) Plaintiff's Exhibit "A"—copy of Ordinance 46222 and Regulations.
5) Decree of the Trial Court.
6) Motion for New Trial.
7) Notice of Appeal to Supreme Court of Missouri.
8) Opinion of the Supreme Court of Missouri.
9) Petition for Appeal.
10) Order Allowing Appeal.
11) Citation on Appeal.
12) Assignment of Errors.
13) Statement of Jurisdiction of the Supreme Court of the United States.
14) Statement Required by Paragraph 2, Rule 12 of the Rules of the Supreme Court of the United States.
15) Certificate of Service of Notice of Appeal.
[fol. 64] 16) Motion to Recall Mandate.
17) The Praecipe.

18) Appellants' Statement of Points to be Relied Upon.
19) This Designation of Parts of the Record to be Printed.

Respectfully submitted, Harry H. Craig, Stanley M. Rosenblum, Counsel for Plaintiffs-Appellants, 408 Olive Street, St. Louis 2, Missouri. CHestnut 8465.

[fol. 65] CERTIFICATE OF SERVICE (omitted in printing)

[fols. 66-67] [File endorsement omitted]

[fol. 68] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 389

FRANK WALTERS and EDWARD WILLIAMS, JR., Appellants,

vs.

THE CITY OF ST. LOUIS, et al.

ORDER NOTING PROBABLE JURISDICTION—November 30, 1953

Appeal from the Supreme Court of the State of Missouri

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

(2300)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 389

FRANK WALTERS AND EDWARD WILLIAMS, JR.,
Appellants,

vs.

THE CITY OF ST. LOUIS, JOSEPH M. DARST, MAYOR, AND DEL L. BANNISTER, COLLECTOR,
Respondents

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

STATEMENT AS TO JURISDICTION

STANLEY M. ROSENBLUM,
HARRY H. CRAIG,
A. CLIFFORD JONES,
Counsel for Appellants.

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IN THE SUPREME COURT OF MISSOURI

No. 43,648

FRANK WALTERS AND EDWARD WILLIAMS, JR.,
Appellants,

vs.

THE CITY OF ST. LOUIS, JOSEPH M. DARST, MAYOR, AND DEL L. BANNISTER, COLLECTOR,
Respondents

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, plaintiffs-appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Supreme Court of Missouri entered in this cause.

Opinion Below

The opinion of the Supreme Court of Missouri is reported at 259 S. W. 2d 377; a copy of the opinion and judgment is attached hereto as Appendix "A".

Jurisdiction

The final judgment of the Supreme Court of Missouri was entered on July 13, 1953. A petition for appeal is presented the Supreme Court of Missouri herewith on September 3, 1953. The suit is one to declare unconstitutional a statute of the State of Missouri and an ordinance of the City of St. Louis whereby a so-called earning tax is levied upon appellants and to enjoin the enforcement of said statute

and ordinance by appellees. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case; *King Manufacturing Co.* v. *City Council of Augusta,* 277 U. S. 100; *Jamison* v. *Texas,* 318 U. S. 413; *Independent Warehouse, Inc.* v. *Scheele,* 331 U. S. 70.

The federal questions to be reviewed were raised in the court of first instance in plaintiffs-appellants' first pleading wherein the unconstitutionality of the statute and ordinance (by which said earnings tax is sought to be levied) was alleged on the grounds that they were in violation of the due process and equal protection of the laws requirements of the Fourteenth Amendment to the Constitution of the United States. These questions were preserved for appellate review in the state court in appellants' motion for a new trial which was overruled in the trial court and were specified and briefed as assignments of error before the Supreme Court of Missouri. In Paragraphs (11) and (15) of appellants' petition, the allegations are made that said House Bill No. 50 and Ordinance are arbitrary, unreasonable, discriminatory, vague and uncertain and in violation of the due process clause and equal protection of the laws requirements of the Fourteenth Amendment. These allegations were denied by appellees in their joint answer and were ruled adversely to appellants by the trial court in its decree of February 5, 1953. Furthermore, such rulings by the trial court were specified as error by appellants in Paragraphs (2) and (5) of their motion for new trial and were briefed and argued before the Supreme Court of Missouri. The opinion of the Supreme Court (which is attached hereto as Appendix "A") considered the federal questions originally presented in appellants' petition and preserved in their Motion For New Trial. With respect to the question

of the violation of appellants' equal protection of the laws by virtue of an arbitrary and discriminatory classification whereby wage-earners are taxed on gross income or gross receipts without deduction for taxes or operating expenses and self-employed persons are taxed on a "net profits" measure with taxes and operating expenses allowed as deductions, the Supreme Court of Missouri found no violation of the Fourteenth Amendment on the authority of *Madden* v. *Commonwealth of Kentucky*, 309 U. S. 83 that the Fourteenth Amendment was not intended to compel the states to adopt an iron rule of equal taxation. In answer to appellants' charge that the term "net profits", defined in the ordinance as "the net income . . . remaining after deducting the necessary expenses of operations from the gross profits or earnings", is indefinite, vague, and uncertain, the Supreme Court of Missouri ruled that the meaning was clear and definite, although it conceded that what constitutes "necessary expenses of operation" makes the definition uncertain and vexing and it concluded that the problem should be left to whatever changes might occur in the common understanding of the concept "net profits" as accepted methods of accounting change. Therefore, it found no denial of due process under the Fourteenth Amendment.

In answer to appellants' charge that the earnings tax Ordinance 46222 was unconstitutional and violative of equal protection by virtue of a discriminatory administration against appellants-wage earners, the Missouri Supreme Court ruled adversely to appellants. As pointed out above, at the earliest opportunity in appellants' initial pleading it was alleged that the Ordinance was violative of the equal protection clause of the Fourteenth Amendment. It was also pleaded that the Ordinance empowered the Collector of the City of St. Louis to promulgate rules and regulations for the administration of the tax and that the appellees were seeking to enforce said Ordinance against appellants

by taking into possession funds withheld by their employer; in their prayer appellants asked that appellees be restrained from enforcing said Ordinance. Appellants' original pleading was filed on September 12, 1952 in the Circuit Court of the City of St. Louis, Missouri. In the *Agreed Statement of Facts,* Paragraph Three thereof, it was stipulated by the parties that some two weeks prior to the filing of this cause the appellee Del L. Bannister, Collector of the City of St. Louis, had on the day after the passage of the Ordinance—August 28, 1952—issued certain administrative and interpretative regulations pursuant to Section Nine thereof. A copy of said Ordinance and regulations was marked Exhibit "A" and incorporated by reference into the record. It was also stipulated that it was pursuant to said Ordinance (Exhibit "A") that the appellees claimed the funds withheld from appellants' wages. In Regulation 2 of Exhibit "A", issued pursuant to Section Nine of the Ordinance, the "necessary expenses" which the Ordinance permits self-employed persons to deduct in computing their "net profits" was defined as including: (1) all necessary and ordinary business expense; (2) all losses sustained in said business, including depreciation; (3) worthless debts arising from said business; (4) all taxes paid which were imposed by authority of the United States or any state, county, school districts, or municipality; (5) all interest paid on taxpayer's indebtedness; and (6) charitable contributions not in excess of 5% of the net income. It was on the basis of the administrative bestowal of great tax advantages upon taxpayers who operate their own businesses that the charge was made that the Ordinance violates the "equal protection" clause. The argument was made both in the trial court and in the Supreme Court of Missouri that, even if the Ordinance was valid on its face, it became unconstitutional by virtue of a discriminatory administra-

tion. Although the individual wage earner, compensated by a fixed salary, incurs expenses in connection with his job, pays federal and local taxes, makes charitable contributions, and incurs interest, he is allowed no deductions therefor; on the other hand, the self-employed person is permitted all such deductions whether business-connected or personal. In ruling on this phase of appellants' charge, the Supreme Court of Missouri ruled that the regulations complained of were not to be treated as part and parcel of the Ordinance; if they were to be so treated, the Court said the Ordinance would become void whenever a Collector promulgated a discriminatory regulation. The Court concluded that it would be wholly unreasonable to declare unconstitutional an ordinance because an administrative agency promulgated a discriminatory rule in attempting to enforce it. As an alternate ground for ruling against appellants' on the discriminatory administration of the Ordinance, the Court ruled that the question of whether the regulations were discriminatory was not before the Court. It wrote that the action does not seek to have the Ordinance declared unconstitutional because of any administrative or enforcemental rule adopted. It also found that the incorporation of the Ordinance and Regulations into the record and the recital that the funds of appellant's were being withheld pursuant thereto could not inject this issue into the case.

Questions Presented

1) Where an enabling act of the Missouri General Assembly (House Bill No. 50) and an ordinance of the City of St. Louis passed pursuant thereto (Ordinance 46222) classify taxpayers so that gross income is taxed to wage-earners and "net profits" (net income after operating

expenses, including income taxes) is taxed to self-employed persons, are such statute and Ordinance unconstitutional by virtue of an arbitrary and unreasonable classification and violative of the due process and equal protection of the laws requirements of the Fourteenth Amendment to the Constitution of the United States?

2) Where an ordinance taxing earnings defines the "net profits" to be taxed to self-employed persons as "net income . . . after deducting the *necessary expenses of operating* from the gross profits or earnings", is such definition so vague and uncertain as to render said Ordinance unconstitutional and violative of the due process requirements of the Fourteenth Amendment to the Constitution of the United States?

3) Where an administrative officer promulgates a discriminatory regulation to a taxing Ordinance and seeks to enforce said Ordinance under said discriminatory regulation, does the Ordinance itself thereby become void and constitutionally violative of the equal protection of the laws requirements of the Fourteenth Amendment?

4) Where there is an allegation that a taxing Ordinance violates the equal protection of the laws requirements of the Fourteenth Amendment and there is evidence in the record of the intentional and discriminatory administration of said Ordinance against certain taxpayers, can the Supreme Court of any state foreclose review by the United States Supreme Court of said federal question of denial of equal protection of the laws and so defeat the taxpayer's claim of federal right by an *ad hoc* application of its own rules of procedure.

Statutes Involved

House Bill No. 50, now Sections 92.110-92.200 R. S. Mo. 1949 V. A. M. S. and Ordinance No. 46222 and Regulation 2 thereof are set forth in Appendix "B" hereto.

Statement

Appellants Frank Walters and Edward Williams, Jr. are both employed as truck drivers by the Shapleigh Hardware Company whose principal place of business is in St. Louis, Missouri. They work on an hourly rate and their gross wages, less federal withholding and social security, are paid to them on an hourly basis. By virtue of an enabling act of the Missouri General Assembly, referred to as House Bill No. 50 and now known as Sections 92.110-92.200 R. S. Mo. 1949 V. A. M. S., the Board of Aldermen of the City of St. Louis passed a so-called earnings tax ordinance, now known as Ordinance 46222, whereby a tax is levied upon the gross wages of appellants. It is under this Ordinance enacted on August 27, 1952 and Regulations promulgated by appellee Bannister that the appellees make claim to certain funds withheld by Shapleigh Hardware from the wages of appellants. By the terms of the earnings tax ordinance, enacted consistent with said enabling act, a tax of one-half of one per cent is imposed on the gross salaries and compensation of all wage earners; it also taxes to the extent of one-half of one per cent the net profits of businesses and associations. Section One of the ordinance defines net profits as "the net income of any association, business or corporation remaining after deducting the necessary expenses of operating from the gross profits or earnings". The words "necessary expenses of operating" is nowhere defined in the ordinance, nor is it stated whether state and federal income taxes are to be considered as "necessary expenses of operating". Pursuant to Section Nine of said ordinance, appellee Bannister in his official capacity promulgated Regulation 2 (see Appendix "B") listing "necessary expenses of operating" as including: (1) all necessary and ordinary business expense; (2) all losses sustained in said business, including depreciation; (3) worthless debts aris-

ing from said business; (4) all taxes paid which were imposed by authority of the United States or any state, county, school districts, or municipality; (5) all interest paid on taxpayer's indebtedness; and (6) charitable contributions not in excess of 5 per cent of the net income. This Regulation was promulgated on August 28, 1952, about three days before the tax levy became effective and was noted as "approved" in copies of the regulations issued to taxpayers. On September 12, 1952—less than two weeks after the effective date of this ordinance—appellants filed this action alleging, among other grounds, that the oridnance was violative of the due process and equal protection of the laws requirements of the Fourteenth Amendment to the Constitution of the United States as being arbitrary, discriminatory and oppressive in certain respects and vague and uncertain in others. These questions were ruled adversely to appellants by Division No. 2 of the Circuit Court of the City of St. Louis in its decree on February 5, 1953. After having preserved these questions for appeal to the Supreme Court of Missouri, appellants' allegations concerning due process and equal protection were denied by the Supreme Court of Missouri in its opinion of June 8, 1953 and denial of appellants' motion for rehearing on July 13, 1953. The Court found that the term "net profits" as defined was not vague and uncertain; it also found that the classification whereby wage-earners were taxed on gross earnings and self-employed persons on "net profits" was not arbitrary and discriminatory. The Court also held that any discriminatory regulations could not invalidate the entire ordinance as a violation of the equal protection of the laws requirements of the Fourteenth Amendment; finally, after having ruled on the discriminatory effect of the regulations, it decided that the question was not properly before it anyhow.

The Questions Are Substantial

The issues involved in this appeal are substantial and are of importance in determining the constitutional limits of the new municipal income taxes. For reasons not germane to this appeal our municipalities have found themselves in so-called financial straits and have proceeded to enact a new type of tax—the municipal income tax. As the cost of living has increased so has the cost of government, and it is the verdict of municipal authorities that the traditional taxes cannot meet the rising tide in cost of municipal government. With Ohio and Pennsylvania cities as pioneers in the field, the municipal income tax is spreading and its adoption is being urged in many other areas as the answer to the problem. As the municipal income tax is enacted in each particular city, it is adapted to the particular economic and legal situation depending upon the financial need and the requisite sanction—whether by constitutional provision or enabling act. Changes are made, but common to the taxing scheme is the classification between the wage-earner and the self-employed person. Gross earnings are taxed to the former while "net profits" are taxed to the latter. The definition of the term "net profits" is generally regarded as equivalent to "net income" for federal income tax purposes with no deduction for income taxes. In House Bill No. 50 and Ordinance 46222, however, here under consideration, the prohibition against deduction for income taxes is omitted. Thus, it becomes of paramount importance to the future extension of municipal income taxes to determine:

a) whether or not a classification taxing gross earnings to wage-earners and net profits to self-employed persons (permitting no deduction for income taxes) is discriminatory and violative of the Fourteenth Amendment, and

b) whether or not such a classification which permits self-employed persons to deduct income taxes as a "neces-

sary expense of operating'' is discriminatory and violative of the Fourteenth Amendment.

The first question has been resolved in favor of constitutionality by the highest courts of two states in *City of Louisville* v. *Sebree*, 308 Ky. 420, 214 S. W. 2d 248 and *Dole* v. *City of Philadelphia*, 337 Pa. 375, 11 A. 2d 163. The question is a federal one and should be determined by this Court as the final arbiter in matters of federal constitutional law. The second question likewise is a federal one and crucial to municipalities who will pattern their income tax after the St. Louis tax. Similarly, this will be a significant and far-reaching decision insofar as appellants' attack on the vagueness and uncertainty of the term ''net profits'' is concerned. Can the term ''necessary expenses of operating'' withstand the test of certainty demanded by the due process clause of the Fourteenth Amendment? Is it sufficient to say that it shall mean whatever accepted methods of accounting say it shall mean, and that it shall change as accepted methods of accounting change? Likewise, insofar as the alleged effect of the Collector's discriminatory regulation is concerned this decision will be of importance to municipal authorities everywhere who face the problem of administering a tax on income where it is sought to deny deductions generally for purposes of simplifying administrative problems and yet at the same time to preserve deductions for so-called ''necessary expenses of operating'' for the entrepreneur.

1. The definition of the term net profits in Ordinance 46222 results in a discriminatory classification between appellants and self-employed persons. ''Net profits'' is defined as the ''net income . . . after deducting the necessary expenses of operating from the gross profits or earnings''. Income taxes are universally considered operating expenses in accounting procedure and are therefore deductible in determining ''net profits'' as defined in the

Ordinance. This means that the self-employed person by the terms of the Ordinance is permitted to deduct income taxes—federal, state and local—while the wage-earner cannot deduct his income taxes. And this is the purport of the ordinance without any regard for the Collector's Regulations. Such a classification, it is submitted, is so arbitrary as to violate the equal protection of the laws of appellants as members of their class. It is true that the highest state courts in Kentucky and Pennsylvania have considered a similar argument in connection with earnings tax ordinances of Louisville and Philadelphia. In those ordinances the term "net profits" was defined as "the net income . . . after provision for all costs and expenses incurred . . ., shall be the same as reported for federal income tax purposes . . . but *without deduction of taxes based on income.*" In *City of Louisville* v. *Sebree*, 308 Ky. 420, 214 S. W. 2d 248 and *Dole* v. *City of Philadelphia*, 337 Pa. 375, 11 A. 2d 163, both ordinances explicitly made income taxes non-deductible and in the *Sebree* case the point was made in particular that no discrimination existed because no deduction was allowed anyone for personal income taxes. It is just the allowance of such a deduction in Ordinance 46222 as a "necessary expense of operating" which makes that ordinance's classification discriminatory by its terms and without regard to the Regulations. Therefore, it is submitted that the situation presented is one of unreasonable classification within the rule of *Quaker City Cab Company* v. *Commonwealth of Pennsylvania*, 277 U. S. 389, 48 Sup. Ct. 553, 72 L. Ed. 927 and indefensible as an exercise of legislative discretion under the rule of *Madden* v. *Commonwealth of Kentucky*, 309 U. S. 83, 60 S. Ct. 406, 84 L. Ed. 590. There can be no reason related to the legitimate ends of the taxing ordinance for allowing self-employed persons to deduct income taxes—state, federal, and local—as necessary operating expenses and denying these same deductions to wage-

earners. Payment of income taxes is as necessary an expense to the employed truck driver (i. e. appellants) as to the self-employed hauler; in both cases one must pay his income taxes in order to insure his continued ability to remain free to earn. Where a deduction for income taxes is allowed to a self-employed person it cannot be said that his "net profits" after deducting taxes as a necessary expense are roughly equal to the wage-earner's gross earnings. Similarly, the deduction of income taxes aside, it would seem that there are other expenses as necessary to a wage earner's business (i. e. work clothes, tools, union dues) as are normal operating expenses to his employer's business. Exact equality between taxpayers is not expected nor can it be attained; however, a rough equity is possible where, as in the federal tax law, a standard deduction or an itemization of such miscellaneous necessary expenses is permitted the wage-earner.

2. By the use in the formula for determining "net profits" of the term "necessary expenses of operation", it is submitted that the statutory meaning of "net profits" is thereby rendered vague, indefinite and uncertain. What are operating expenses as contrasted with non-operating expenses is a matter on which there is not even complete agreement between accountants; in many areas there is complete accord; however, in others, such as the classification of charitable contributions the answer will depend more on the accountant's training and background than on any accepted principle of accounting. This uncertainty was recognized by the Supreme Court of Missouri when it admitted that the meaning of the phrase "necessary expenses of operation" is a vexing problem and that the concept of its meaning changes from time to time as accepted methods of accounting change. It is such indefiniteness that appellants are unwilling to accept and submit is sufficient warrant for holding said ordinance void. Assuming, as the

Supreme Court of Missouri does, that the concept of its meaning will change from time to time as accepted methods of accounting change, how shall taxpayers in the future determine when an accepted method of accounting has changed? Shall it be considered accepted when taxpayer's accountant changes his concept? Or must it be accepted by the Journal of Accountancy? It seems that appellants are not alone in discerning such obvious vagueness, for, pursuant to Section Nine of the Ordinance, the Collector issued Regulation 2 setting forth an interpretation of the phrase by which taxpayers are to be guided. Aside from the discriminatory effect of the Regulation which will be discussed later, appellants submit that such Regulation which is part of the record as Exhibit "A" is proof enough of the alleged indefiniteness; it is an interpretative Regulation, authorized by the Ordinance itself, wherein it is sought to make certain and definite that which is uncertain and indefinite. If the vague and indefinite meaning of the phrase "necessary expenses of operation" is not to render the Ordinance void, it must be saved by Regulation 2. It would seem a clear abandonment of the City Council's legislative function to hold, as the Supreme Court of Missouri has, that the ultimate meaning is to be subject to the vagaries of accounting theory and accountants who will determine from time to time what changes become accepted.

3. The discriminatory administration of the Ordinance under the Regulation is amply shown in the record and renders the Ordinance void in violation of the "equal protection" clause of the Fourteenth Amendment to the Constitution of the United States. Regulation 2 is part of Exhibit "A" found in the record. This Regulation is indefensible as a fair one under which the earnings tax is collected and administered; it goes further even than the Ordinance itself where the discrimination is at least confined to income taxes and the other "necessary expenses of operation." Regulation 2 permits the deduction of expenses by

the self-employed taxpayer in computing his "net profits" of non-business expenses, such as *all* interest paid and *all* charitable contributions. To illustrate this inequality, compare the tax liability of plaintiffs with self-employed truck drivers having the same annual gross income as plaintiffs. The self-employed truck driver, in computing his taxable income, can deduct any ordinary and necessary business expenses, but the employed truck driver can deduct none of his ordinary and necessary business expenses, such as union dues, chauffeur's license, and cost of work clothes. The self-employed truck driver can deduct federal and state income taxes, the very earnings tax which he is paying, and all property taxes, real or personal; the deductibility of these taxes is not based on any relationship to the self-employed taxpayers' business, being proper deductions even if *personal taxes.* The employed truck driver can deduct no taxes under any circumstances. Similarly the self-employed taxpayer can deduct all interest paid on indebtedness and charitable contributions not in excess of 5% of his net income; these items are deductible even though *non-business* and *purely personal.* But the employed truck driver can deduct no interest of any kind and no charitable deductions. Such a Regulation under which the Ordinance is being administered can only be an intentional and systematic discrimination against appellants and wages earners generally which renders the Ordinance void and unconstitutional under the rule of *Yick Wo* v. *Hopkins,* 118 U. S. 356, 30 L. Ed. 220, 6 Sup. Ct. 1064.

In appellants' initial pleading by which this cause was instituted it was alleged that Ordinance 46222 was arbitrary, unreasonable, and discriminatory and in violation of the equal protection of the laws requirements of the Fourteenth Amendment. It was stipulated that the funds withheld from appellants' wages by their employer were being claimed by appellees by virtue of the Ordinance and Regulations. The Supreme Court of Missouri first concluded

that even if the Regulations were discriminatory, it would be unreasonable to declare the Ordinance unconstitutional because an administrative officer issued a discriminatory rule and attempted to enforce the ordinance under such discriminatory rule. In this respect appellants contend that the Court has overlooked the rule of *Yick Wo* v. *Hopkins, supra,* where the Supreme Court of the United States did not think it unreasonable to declare unconstitutional an ordinance which, though valid on its face, was being administered in an arbitrary manner. As an alternative ground for ruling against appellants, although it had already considered and ruled on the specific issue the Supreme Court of Missouri held that the discriminatory administration was not properly before it because not pleaded; it thought that, even though the Regulations were before it as part of the record, the question of their legal effect was a foreign issue. Appellants submit that whether or not they have been denied equal protection of the laws is a federal question from a consideration of which this Court can not be foreclosed. A federal right cannot be defeated by so-called local practice. The Supreme Court of the United States need not accept as final a state court's interpretation of allegations in a complaint asserting it, *Brown* v. *Western Ry.*, 338 U. S. 294, 70 S. Ct. 105, 94 L. Ed.

It is submitted that the decision of the Supreme Court of Missouri fails to apply properly the guarantees of equal protection of the laws and due process afforded by the Fourteenth Amendment. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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Counsel for Appellants.

APPENDIX "A"

IN THE SUPREME COURT OF MISSOURI
COURT EN BANC

APRIL SESSION, 1953

No. 43,648*

FRANK WALTERS and EDWARD WILLIAMS, JR., Appellants,

vs.

CITY OF ST. LOUIS, a Municipal Corporation; JOSEPH M. DARST, Mayor of the City of St. Louis; and DEL L. BANNISTER, Collector of the City of St. Louis, Missouri, and Director of the Collection Division of the Department of Finance of the City of St. Louis, Missouri, Respondents.

Appeal from the Circuit Court of the City of St. Louis

Division No. 2

Honorable WILLIAM B. FLYNN, Judge

This action involves the constitutionality of Ordinance No. 46,222 of the City of St. Louis, commonly called and herein referred to as the "earnings tax" ordinance. The trial court upheld its constitutionality and plaintiffs appealed.

Appellants, one a resident of the City and the other a resident of St. Louis County, are wage compensated employees of the Shapleigh Hardware Company, a corporation domiciled and doing business in the City. Since the enactment of the ordinance and pursuant to its provisions, the employer has withheld and unless the ordinance is declared invalid will continue to withhold from their wages as they accrue one-half of one per centum thereof for disbursement to the City in discharge of the tax levied upon their wages under said ordinance. The petition, which names the City, its Mayor, its Collector, and Shapleigh Hardware Company as defendants, prays a judgment declaring the ordinance void, declaring the act of the Legis-

lature which authorized its enactment void, and enjoining the defendants from carrying the ordinance into effect. It appearing to the trial court after submission that no issue was presented as to Shapleigh Hardware Company, it was conditionally dismissed from the action.

The grounds upon which plaintiffs sought judgment declaring the ordinance void and upon which they assign error of the trial court in refusing to so hold are:

(1) The enabling act of the 66th General Assembly upon which the ordinance is predicated, to wit: House Substitute for House Bill No. 50, now §§ 92.110-92.200 RSMo 1949 V. A. M. S., is violative of the following provisions of the Constitution of Missouri:

(a) Article III, § 40, prohibiting the enactment of local or special laws in the instances set forth in clauses (21) and (30) thereof;

(b) Article X, § 11(f), authorizing enactment of general laws permitting a county or other political subdivision to levy taxes other than those ad valorem; and

(c) Said House Bill No. 50 was not enacted in compliance with Article III, § 22, requiring each committee of the House and Senate to which a bill is referred to keep a record of its proceedings and report the vote of its members to be filed with all reports thereon.

(2) The ordinance and said House Bill No. 50 are arbitrary, unreasonable, discriminatory, vague and therefore violative of the due process clause of the Constitution of Missouri, to wit: Article I, § 10; of the due process and equal protection clauses of the Constitution of the United States, to wit: the Fourteenth Amendment thereof; and of Article X, § 3, of the Constitution of Missouri, requiring that taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax and shall be levied and collected by general laws.

On the 19th day of May, 1950, the Board of Aldermen of the City of St. Louis adopted a resolution stating in part:

"We * * * do hereby take official recognition of the impending financial crisis confronting the City of St. Louis.

"Whereas, the cost of government in the City of St. Louis has increased from approximately $20,000,000 to $40,000,000

in the last ten years, and the ordinary sources of taxation have not been sufficient to meet this increase in the cost of municipal government, and it has heretofore been necssary to enact an earnings tax in the City of St. Louis for the maintenance of the solvency of our local government; and

"Whereas, the General Assembly of the State of Missouri has heretofore enacted enabling legislation authorizing the City of St. Louis to levy an earnings tax which has been productive of approximately $7,000,000 per year, and the authority heretofore granted by the said General Assembly expires on July 17, 1950, and that thereafter the City of St. Louis will not have authority to continue this vital source of income; and

"Whereas, the loss of the aforesaid income would necessarily result in a curtailment of City services, thus endangering the health, welfare and safety of our citizens.

"Now, Therefore, Be It Resolved, that we * * * do hereby urge the Honorable Forrest Smith, Governor of the State of Missouri, to call a special session of the General Assembly for the purpose of continuing the authorization of this City to levy an earnings tax, and we further request the members of the General Assembly of the State of Missouri to act favorably upon said proposed legislation; * * *."

The City of St. Louis is a constitutional charter city, having a population of more than 700,000 inhabitants as determined by the decennial census of 1950. Organized under Article IX, §§ 20-26, Constitution of 1875, in the dual character of both a city and county, it has the unique distinction of being the only city specifically named in the Constitution of 1945, Article VI, § 31. It is also agreed that, although possible, it is a practical certainty no other such constitutional charter city of more than 700,000 inhabitants will come into existence in Missouri during the period of time in which House Bill No. 50 is effective.

(Although not specifically named in the Constitution of 1945, Kansas City was and still is a constitutional charter city, and subsequent to the adoption of the 1945 Constitution, University City, Columbia, Springfield, and possibly others, have framed and adopted their own charters. Sec-

tion 82.010 RSMo 1949 V. A. M. S. recognizes their status in that respect along with that of the City of St. Louis.)

In its dual capacity as a city and county, the expenditures of the City of St. Louis for the fiscal year 1943-1944 amounted to $21,752,165, and its expenditures in said dual capacity in the fiscal year 1951-1952 amounted to $43,052,595. Established sources of revenue, absent an earnings tax, or an increase of other taxes, or a levy of additional taxes, are insufficient to meet the requirements of appropriations as passed by the Board of Aldermen. In the fiscal year 1951-1952 the operating deficit amounted to $3,307,138. The enabling act approved by the Governor on the 28th day of May, 1948, authorizing the City to levy a tax on earnings for the period ending July 17, 1950, and the tax levied pursuant to said act of 1948, yielded a tax during the two-year period of the existence of said ordinance amounting to $12,906,085, and during the two years said tax was in effect the City was able to operate without a deficit.

The enabling act here involved, hereinafter referred to as House Bill No. 50, became effective (unless held to be unconstitutional) on July 29, 1952. Insofar as pertinent, it provides:

§ 92.110. "Any constitutional charter city in this state which now has or may hereafter acquire a population in excess of seven hundred thousand inhabitants, according to the last federal decennial census, is hereby authorized to levy and collect, by ordinance for general revenue purposes, an earnings tax on the salaries, wages, commissions and other compensation earned by its residents; on the salaries, wages, commissions and other compensation earned by nonresidents of the city for work done or services performed or rendered in the city; on the net profits of associations, businesses or other activities conducted by residents; on the net profits of associations, businesses or other activities conducted in the city by nonresidents; and on the net profits earned by all corporations as the result of work done or services performed or rendered and business or other activities conducted in the city."

§ 92.120. Such tax shall not be in excess of one per centum per annum.

§ 92.150. "The net profits or earnings of associations, businesses or other activities, and corporations shall be ascertained and determined by deducting the necessary expenses of operation from the gross profits or earnings."

§ 92.200. The act shall expire April 1, 1954.

Appellants thus state their first contention:

"The gravamen of appellants' charge that House Bill No. 50 is unconstitutional is found in those provisions of our Constitution of 1945 prohibiting special legislation, namely, Article III, Section 40, sub-paragraphs 21 and 30, and Article X, Section 11(f). Simply stated, appellants submit that the classification of constitutional charter cities by population according to the last federal decennial census when read with the final section of the act causing it to expire April 1, 1954, six years before the next federal decennial census, makes the act applicable only to the City of St. Louis under a then existing state of facts and by its very terms fails to hold the class open so that other constitutional charter cities might come within it. This requirement that a statute be "open-ended" in order to avoid the constitutional prohibition against special legislation is well-settled in Missouri; and this fundamental requisite of a general law—its "open-endedness"—is as applicable to the City of St. Louis as to any other political subdivision in this state."

Respondents' answer to this contention is that Article VI, § 31, of the Constitution of 1945, classifying the City of St. Louis in its dual capacity of city and county and affirming its powers, organization, rights and privileges, being special in its terms, prevails over the general provisions of Article III, § 40, prohibiting the General Assembly from passing any local or special law (clause 21) regulating the affairs of counties and cities, or (clause 30) where a general law can be made applicable.

Respondents' contention fails, however, to take into consideration the provisions of Article X, § 11 (f), of the Constitution, which is as follows: "Nothing in this constitution shall prevent the enactment of any *general law* permitting any county or other political subdivision to levy taxes other than ad valorem taxes for its essential purposes." (Em-

phasis ours.) By the clear implication of that provision, legislative permission to any city or other political subdivision to enact an earnings tax ordinance can only be granted by a general law. We can attach no other meaning to it. Of course, this does not mean that a general law permitting the levy of such a tax would be local or special because it was operative only in the City of St. Louis, provided it was prospective in its terms so as to become operative in other cities as they come within the classification therein specified. State ex rel. Zoological Board of Control v. City of St. Louis, 318 Mo. 910, 1 S. W. 2d 1021, 1027; State ex rel. Carpenter v. City of St. Louis, 318 Mo. 870, 2 S. W. 2d 713, 718.

Appellants concede the law to be as above stated. They assert, however, that even though House Bill No. 50 purports in the first section thereof (92.110) to be applicable to "any constitutional charter city in this state which now has or may hereafter acquire a population in excess of seven hundred thousand inhabitants, according to the last federal decennial census * * *", yet § 92.200 fixing the expiration date of the act at April 1, 1954, is destructive of the recital in the first section and makes the act applicable only to the City of St. Louis under the existing state of facts, and thereby prevents any other constitutional charter city which hereafter may attain a population of 700,000 from the benefit of its provisions.

In support of their position they rely upon the case of Reals v. Courson, 349 Mo. 1193, 164 S. W. 2d 306. One of the grounds upon which the statute there under consideration was declared unconstitutional unquestionably supports appellants' position in the instant case. However, a reexamination of the Reals case has convinced us that although we were correct in holding the statute there involved unconstitutional upon another ground therein discussed, we erred in holding it unconstitutional upon the ground above asserted. (It perhaps should be here stated that the ground upon which we base this conclusion was not advanced in the submission of that case.)

That case involved a statute enacted in 1941. It authorized the boards of directors of school districts, formed of

cities and towns in counties having more than 200,000 inhabitants and less than 450,000 inhabitants, * * * to issue school bonds. The last section thereof provided that the act should expire January 1, 1946. St. Louis County then was the only county in the State within the range of that classification; and it was, as in the instant case, a practical certainty that no other county would come within that classification during the period in which the statute was to be effective. One of the grounds upon which we held the statute unconstitutional was that the classification therein made was unreasonable and arbitrary in that there were other counties containing school districts similarly situated to which a general law could have been made applicable. As stated, we are convinced the case was soundly ruled on that ground.

But we further said, l. c. 309: "Therefore, we have a legislative enactment classifying counties and thereby school districts so that the act can only apply to the counties —in this instance the county, which on the day of its enactment had the requisite population of more than 200,000 and less than 450,000 inhabitants. It can apply to an existing state of facts only, that is to the one county in Missouri, then falling within the classification and therefore, in fact, cannot be said to have created a future class into which other counties might fall." (Cases cited.)

The trouble with the conclusion above quoted is that it denies the well established rule of "open-endedness" to legislation pertaining to cities (or counties or other subdivisions) of a specified classification when it appears with reasonable certainty that no other city (or political subdivision) will come within the classification during the term of the legislation when the term thereof is of limited duration. To so rule would deny to the General Assembly the right to authorize for a limited period of time the City of St. Louis to enact an emergency earnings tax ordinance likewise so limited solely because its population was so far in excess of that of any other city that none would come within the classification during the emergency. We think the Constitution does not sanction such discrimination. The fact that a statute is limited as to the time of its duration does not

make it local or special so long as it applies to all within, or that may come within, the enumerated class during its effective period. State ex rel. Attorney General v. Lee, 193 Ark. 270, 99 S. W. 2d 835; 50 Am. Jur., Statutes, §§ 514, 515, p. 525. The act here under consideration does precisely that.

All of the cases cited in support of the conclusion reached in the Reals case deal with legislative acts that are to continue in perpetuity unless repealed. They are soundly ruled. It is obvious that limitation of the operation of an act that is to continue in perpetuity to a certain city or cities then comprising a specified classification without leaving it open to operate upon all cities thereafter attaining the same classification, thereby resulting in the possibility of the act becoming applicable to some one or more, but not all, of the same classification, would be to deprive the latter of its benefits. Such an act would run afoul of the rule we long since adopted in this State: "A statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special." Reals v. Courson, 349 Mo. 1193, 164 S. W. 2d 306, 307, 308, and cases cited therein.

In the instant case, we are dealing with an entirely different type of legislation: legislation of limited duration. By its terms, the enabling act here involved is operative upon any constitutional charter city in this State that now has or may hereafter acquire a population of more than 700,000 prior to its expiration date of April 1, 1954. The conceded fact that it is a practical certainty no other city in this State will attain a population of more than 700,000 prior to the expiration date of the act, April 1, 1954, does not in the least affect the situation. The act still does not exclude any city that *may* come within the classification therein made during its effective existence; to the contrary, it expressly includes any such city. It therefore applies to all cities of more than 700,000 population, whether there be one or many, so long as it is effective, and does not offend against the rule. Consequently, the Reals case should no longer be followed insofar as it is in conflict herewith. Ap-

pellants' contention of unconstitutionality of House Bill No. 50 in the foregoing respects must be overruled.

The next assignment deals with the last sentence of Article III, § 22, of the Constitution, reading: "Each committee [to which a bill has been referred] shall keep such record of its proceedings as is required by rule of the respective houses and this record and the recorded vote of the members of the committee shall be filed with all reports on bills."

Following the adoption of the Constitution, the Senate adopted a rule implementing the above provision, and which in the 66th General Assembly was designated as Rule 44, reading as follows: "Each committee shall keep a record of the total number of members present when a bill is finally considered; and this record and the record of the total number voting favorably and the total number voting unfavorably on said bill, shall be filed by the committee with its report (Constitution, Art. III, Sec. 22)." It is stipulated that the report of the Ways and Means Committee of the Senate to which House Bill No. 50 was referred was made in the same manner as the reports of the several committees of the several sessions of the 63rd, 64th, 65th and 66th General Assemblies on all bills passed at each session thereof, and that such is the procedure now followed.

The report on House Bill No. 50 showed the vote thereon as follows: "Members present: 10; Members voting aye: 9; Members voting no: 0; Members not voting: 1."

Appellants insist that the report as made is insufficient in that it does not set forth the names of the individual members and how each of them voted. In support of that contention they cite many cases in an effort to establish that the provisions of said Sec. 22 are mandatory and quote extended excerpts from the debates on this section during the Constitutional Convention in an effort to establish that the construction they place upon the meaning of § 22 is its intendment. Respondents cite cases and quote excerpts from the debates in an effort to establish the contrary of both contentions made by appellants. No good purpose would be served in a discussion of these cases or debates. This, for the reason that the provision simply does not re-

quire the recording of the vote of each of the members. This court would be going far afield in interpolating into the provision language that is not there and then declaring it mandatory. No one can say that the construction placed thereon by the Senate is not a literal compliance with its provisions. This point must be ruled against appellants.

This brings us to appellants' contention that the ordinance and House Bill No. 50 are unreasonable, discriminatory and uncertain and therefore violative of (a) the due process clause of the Constitution of Missouri, (b) the due process and equal protection of the laws clauses of the Federal Constitution, and (c) the requirement of uniformity of taxes levied upon the same class of subjects within the territorial limits of the levying authority.

Section Two of the ordinance imposes the tax of one-half of one per centum on (a) the salaries, wages, commissions and other earned compensation of individuals and on (b) the net profits of corporations, associations and businesses. "Net profits" are defined in Section One thereof as "the net income of any association, business or corporation remaining after deducting the necessary expenses of operation from the gross profits or earnings." Section Nine thereof charges the city collector with the enforcement of the ordinance and empowers him to adopt, promulgate and enforce "rules and regulations relating to any matter or thing pertaining to the administration and enforcement of the provisions of the ordinance * * *." Pursuant thereto, he promulgated and published in pamphlet form, under date of August 28, 1952, a set of rules and regulations. In the foreword attached thereto, it is stated: "This first issue of the rules and regulations, which is flexible, is *intended as a guide* to those subject to the Earnings Tax and will be supplemented from time to time as may be necessary." (Emphasis ours.)

Among the rules so adopted was a definition of the meaning of the term "net profits". It declared, as does House Bill No. 50, "net profits" to be the net income of any association, business or corporation remaining after deducting the necessary expenses of operation from the gross profits or earnings. It then authorized the following deductions

from gross profits or earnings in determining "net profits": (1) ordinary and necessary expenses of conducting the business; (2) all losses, including reasonable allowances for exhaustion, depreciation, obsolescence or wear and tear; (3) bad debts arising and charged off during taxable year; (4) all taxes except those for local benefits and on inheritances; (5) all interest paid within the year on taxpayer's indebtedness; and (6) charitable contributions not in excess of 5% of net income.

In launching their attack upon this phase of the ordinance, appellants assume that the rules promulgated by the collector are to be treated as a part and parcel of the ordinance. If they are to be so treated, the result is that the ordinance will become void whenever the city collector, through ignorance, excessive zeal or sheer venality, promulgates a rule that is discriminatory, vague or uncertain. While it is true that he is authorized to make rules relating to "any matter or thing pertaining to the administration and enforcement" of its provisions, certainly he is not thereby impliedly empowered to make any rule that will invalidate the ordinance.

Furthermore, this action does not seek to have the ordinance declared unconstitutional because of any administrative or enforcemental rule adopted. A careful reading of the petition fails to disclose any mention of the rules other than that the ordinance "attempts to empower the defendant collector * * * to promulgate necessary rules and regulations for the administration of the tax, and authorizing every employer collecting or remitting the tax to deduct and retain therefrom three per cent of the total amount withheld * * *." No where in the charging part or in the prayer of the petition is any complaint leveled against or relief sought on account of the rules. But appellants say the case was tried upon that theory and cite as authority for their assertion the agreed statement of facts, wherein a recital is made as to the adoption of the ordinance and promulgation of rules, and that a "copy of said ordinance and said pamphlet is hereto attached, * * * incorporated herein by reference, pursuant to which ordinance and enabling act defendant Del L. Bannister [Collector] claims

the funds withheld from the wages of plaintiffs by defendant Shapleigh Hardware Co."

We are clearly of the opinion that such a recital in the agreed statement of facts cannot inject into the case an issue that is wholly foreign to the whole theory upon which the action is predicated and pleaded.

However, we are convinced that a mere misconception, if such it be, on the part of the collector at the time he issued the first set of rules defining his idea of what constituted allowable deductions in reckoning "net profits", or a vague statement therein, whereby some advantage might accrue to a business institution or self-employed individual as against a wage earner, could not invalidate the ordinance. The rules, at most, purport to be no more than a guide. See City of Louisville v. Sebree, 308 Ky. 420, 214 S. W. 2d 248, 255; Sutherland's Statutory Construction, 3rd Ed., Vol. 2, § 2405, p. 180. For instance, it would be wholly unreasonable to declare unconstitutional a state statute because an administrative agency promulgated a discriminatory rule in attempting to enforce it. Likewise, so would it be to declare an ordinance void on the same basis.

Is the classification of those subject to the provisions of the act into two groups, to wit: (1) those in business for themselves and (2) wage earners, arbitrary and unreasonable?

Appellants concede, as they must, that a state may make such classifications even though they result in the imposition of unequal taxes on the various classes, provided the classifications are reasonably related to the ends the statute seeks to achieve, citing Caskey Baking Co. v. Commonwealth of Virginia, 313 U. S. 117, 61 S. Ct. 881, 85 L. Ed. 1223; Nashville, C. & St. L. Ry. v. Browning, 310 U. S. 362, 60 S. Ct. 968, 84 L. Ed. 1254; Madden v. Commonwealth of Kentucky, 309 U. S. 83, 60 S. Ct. 406, 84 L. Ed. 590. They contend, however, the classification here made is unreasonable and arbitrary and, in so doing, rely strongly upon the cases of Quaker City Cab Co. v. Commonwealth of Pennsylvania, 277 U. S. 389, 48 S. Ct. 553, 72 L. Ed. 927, and City of St. Louis v. Spiegel, 75 Mo. 145.

In the Quaker City Cab case, the statute involved levied a tax upon the gross receipts of "every transportation

company, now or hereafter incorporated or organized" under the laws of any sovereignty and doing business in Pennsylvania, owning or operating any railroad or other device for the transportation of freight or passengers. The Quaker Company, a New Jersey corporation, operated a fleet of taxicabs in Pennsylvania. In so doing, it was subjected to competition by individuals and partnerships operating taxicabs. The court held the act violative of the Fourteenth Amendment, saying: "In effect section 23 divides those operating taxicabs into two classes. The gross receipts of incorporated operators are taxed, while those of natural persons and partnerships carrying on the same business are not. The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed." The syllabus in the Spiegel case fairly summarizes the nature of the case and its holding: "A license fee upon the keepers of meatshops is a tax, and must be uniform within the territorial limits of the authority imposing it. Const. 1875, Art. 10, § 3. A city ordinance, therefore, which requires a license fee of $100 in one part of the city and $25 in the rest, is void."

It is clear there is no analogy between the classifications in those cases and the instant case. In those cases there was patent discrimination between taxpayers of the same class, to wit: those engaged in identical occupations. Other cases cited by appellants, far too numerous to separately discuss, are found not to be in point.

In determining the reasonableness of the classification made by the ordinance here involved, certain established rules of construction are pertinent:

"Classification is not discrimination. It is enough that those in the same class are treated with equality." Caskey Baking Co. v. Commonwealth of Virginia, 313 U. S. 117, 61 S. Ct. 881, 883, 85 L. Ed. 1223. See also: State ex rel. Jones v. Nolte, 350 Mo. 271, 282, 165 S. W. 2d 632, 636; Campbell Baking Co. v. City of Harrisonville, 50 F. 2d 670, 673; City

of St. Charles ex rel. Palmer v. Schulte, 305 Mo. 124, 129, 130, 264 S. W. 654, 655, 656.

In Madden v. Commonwealth of Kentucky, 309 U. S. 83, 60 S. Ct. 406, 84 L. Ed. 590, the court said: "The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. This Court fifty years ago concluded that 'the fourteenth amendment was not intended to compel the states to adopt an iron rule of equal taxation,' and the passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." See also Hull v. Baumann, 345 Mo. 159, 131 S. W. 2d 721, 726.

In the case of Dole v. City of Philadelphia (1940), 337 Pa. 375, 11 A. 2d 163, the Supreme Court of Pennsylvania had under consideration an ordinance similar to the ordinance here involved. That ordinance imposed a tax on (a) salaries, wages, commissions and other earned compensations, and (b) on the net profits of businesses, professions or other activities. In discussing that feature of the ordinance, the court said: "Furthermore, salaries and wages are in their nature essentially certain, and free from the speculative features inevitably attached to net profits. A business or professional man at the end of a year of industrious work may find that his efforts have produced no net income,—only a loss. In another year his net profit may be tremendous. The salaried man or wage earner

proceeds on a more even keel. He usually knows in advance of performance just how much his salary or wage will be. Also, he knows currently what he is earning, while the business or professional man generally calculates his net profit or loss on an annual basis. He has to operate and calculate on a long range basis. Many of our laws for the benefit of employees are based upon these, and other fundamental and universally recognized, differences between the earning position of an employee and that of a business or professional man depending, not on salary, but on net profits for his livelihood."

A more recent case upholding similar classification is the case of City of Louisville v. Sebree (1948), 308 Ky. 420, 214 S. W. 2d 248.

It is clear that the ordinance in the instant case deals with two distinct subjects of taxation and with two broad and distinct classes of taxpayers. One deals with "salaries, wages, commissions and other compensation", for which the individual earner is liable. The other deals with "net profits" of those in business for themselves, for which they are liable. Within each class there is no discrimination. No sound reason has been advanced to show such classification unreasonable. We hold the ordinance valid in this respect.

Finally, appellants say that the term "net profits", as defined in the ordinance, is so uncertain that the legislative intent can only be gathered from the collector's regulations. We cannot agree. Section One of the ordinance defines "net profits" as "the net income of any association, business or corporation remaining after deducting the necessary expenses of operations from the gross profits or earnings." It is substantially in the wording, and has the identical meaning, of the definition of "net profits" set forth in House Bill No. 50. The meaning is clear and definite. The problem of what consitutes "necessary expenses of operation" is, and perhaps always will be, vexing. It is a matter of common knowledge that the concept of the meaning of this phrase changes from time to time as accepted methods of accounting change. In any event, however, for the reasons hereinabove stated, the question of

whether the rules promulgated by the collector in an effort to provide a uniform method of determining "net profits" are discriminatory is not before us. Appellants' final point is therefore overruled.

The judgment of the trial court is affirmed.

All concur.

FRANK HOLLINGSWORTH,
Judge.

APPENDIX "B"

CHAPTER 92

R. S. Mo., 1949 V. A. M. S.

Taxation in St. Louis and Kansas City

92.110. *Tax May Be Levied on Earnings and Profits (St. Louis)*

Any constitutional charter city in this state which now has or may hereafter acquire a population in excess of seven hundred thousand inhabitants, according to the last federal decennial census, is hereby authorized to levy and collect, by ordinance for general revenue purposes, an earnings tax on the salaries, wages, commissions and other compensation earned by its residents; on the salaries, wages, commissions and other compensation earned by nonresidents of the city for work done or services performed or rendered in the city; on the net profits of associations, businesses or other activities conducted by residents; on the net profits of associations, businesses or other activities conducted in the city by nonresidents; and on the net profits earned by all corporations as the result of work done or services performed or rendered and business or other activities conducted in the city. Laws 1951, p. —, H. S. H. B. No. 50, Section 1.

92.120. *Tax Rate Limits (St. Louis)*

The tax on salaries, wages, commissions and other compensation or individuals, subject to tax, and on the net

profits or earnings of associations, businesses or other activities, and corporations, subject to tax, shall not be in excess of one per centum per annum. Laws 1951, p. —, H. S. H. B. No. 50, Section 4.

92.130. *Income Exempt from State Income Tax Not to Be Taxed (St. Louis)*

The income referred to in Sections 143.120 to 143.150, R. S. Mo. 1949, as not being subject to state income tax shall not be taxable under any tax ordinance enacted pursuant to the provisions of Sections 92.110 to 92.200. Laws 1951, p. —, H. S. H. B. No. 50, Section 6.

92.140. *Exemptions and Deductions from Tax May Be Authorized by City (St. Louis)*

The municipal assembly of any such city may provide for deductions and exemptions from salaries, wages and commissions of employees and may provide for exemptions on account of the wives, husbands and dependents of such employees. Laws 1951, p. —, H. S. H. B. No. 50, Section 2.

92.150. *Net Profits, How Ascertained (St. Louis)*

The net profits or earnings of associations, businesses or other activities, and corporations shall be ascertained and determined by deducting the necessary expense of operation from the gross profits or earnings. Laws 1951, p. —, H. S. H. B. No. 50, Section 1.

92.160. *Tax Ordinance to Contain Formulae for Taxing Profits of Nonresident (St. Louis)*

The earnings or net profits subject to tax of any nonresident individual, of any association or business conducted by nonresidents, or of any corporation, in any case in which the work done, services performed or rendered, and business or other activities conducted are done, performed, rendered or conducted both within and without the city may be ascertained by formulae set forth in any ordinance enacted pursuant to sections 92.110 to 92.200 or prescribed by rules or regulations adopted pursuant to such ordinance. Laws 1951, p. ——, H. S. H. B. No. 50, Section 5.

92.170. *Employers May be Required to Collect Tax—Allowance (St. Louis)*

Any such city is hereby authorized to impose upon employers the duty of collecting and remitting to the city any tax that may be levied upon the earnings of employees pursuant to sections 92.110 to 92.200, and to prescribe penalties for failure to perform such duty. In the event that any such city should impose such duty on employers, each such employer shall be entitled to deduct and retain three per cent of the total amount collected to compensate such employer for collection such tax. Laws 1951, p. ——, H. S. H. B., No. 50, Section 7.

92.180. *Wage Brackets May be Established (St. Louis)*

In order to facilitate the collection of the tax herein authorized, any such city may by ordinance create wage brackets within which the tax shall be uniform for taxpayers entitled to the same number of exemptions. Laws 1951, p. ——, H. S. H. B. No. 50, Section 8.

92.190. *Tax Ordinance Not to Require Copies of Federal or State Income Tax Returns (St. Louis)*

No tax ordinance enacted pursuant to the provisions of sections 92.110 to 92.200 shall require any taxpayer to file copies of his state or federal income tax returns with any city officer, employee or other person designated by said ordinance to collect or otherwise administer any tax imposed thereunder. Laws 1951, p. ——, H. S. H. B. No. 50, Section 9.

92.200. *Law to Expire, When*

The provisions of sections 92.110 to 92.200 shall expire April 1, 1954. Laws 1951, p. ——, H. S. H. B. No. 50, Section 11.

EXHIBIT "A"

Ordinance 46222

An Ordinance levying and imposing an earnings tax for general revenue purposes of one-half of one per cent on salaries, wages, commissions and other compensation earned after August 31, 1952, by residents of the City of St. Louis; on salaries, wages, commissions and other compensation earned after August 31, 1952, by non-residents of the City, for work done or services performed or rendered in the City; on the net profits earned after August 31, 1952, of associations, businesses, or other activities conducted by a resident or residents of the City; on the net profits earned after August 31, 1952, of associations, businesses, or other activities conducted in the City by a non-resident or non-residents; and on the net profits earned after August 31, 1952, by all corporations as a result of work done or services performed or rendered and business or other activities conducted in the City; prescribing a formula for the ascertainment of the net profits subject to tax of any corporation, or association or business conducted in whole or in part by non-residents of the City, in any case in which the work done, services performed or rendered, and business or other activities conducted are done, performed, rendered, or conducted both within and without the City; authorizing any such taxpayer to file with the Collector an application for an alternative method of allocation or apportionment of the net profits reasonably attributable to work done, services performed or rendered, and business or other activities conducted in the City; prescribing a formula for the ascertainment of earnings subject to tax of any non-resident individual in any case in which the work done, services performed or rendered, and business or other activities conducted are done, performed, rendered or conducted both within and without the City, and empowering the Collector to determine by rule or regulation a different apportionment of such earnings as are reasonably attributable to work done, or services performed or rendered in the City in cases where the services rendered are of a peculiar na-

ture, or where the basis of compensation is unusual, or for any other reason; providing for the filing of returns and payment of the tax by individuals, associations, businesses, corporations, fiduciaries, and other entities, and for the furnishing of information by such taxpayers and by employers; imposing on employers the duty of collecting the tax at the source; prescribing the duties and powers of the Collector; providing for interest and penalties on delinquencies; providing that the divulgence of confidential information or the failure, neglect, or refusal to make any return required under this ordinance, or the failure, neglect, or refusal of any employer to withhold or pay over to the City any amount of tax subject to withholding under this ordinance, or the refusal to permit authorized examinations by the Collector, or the making, knowingly, of any incomplete, false, or fraudulent return, or the attempt to do anything whatsoever, to avoid the full disclosure of the amount of earnings or profits, shall constitute a misdemeanor; providing generally for the administration and enforcement of this ordinance and the collection of the tax; empowering the Collector to promulgate necessary rules and regulations for the administration of the tax; providing that income exempt from the state income tax laws shall be exempt from taxation under the provisions of this ordinance; authorizing every employer collecting and remitting the tax to deduct and retain therefrom three per cent (3%) of the total amount withheld by such employer; containing a separability clause; repealing Article XIV of Chapter 23 of the Revised Code of the City of St. Louis, Missouri, 1948; and containing an emergency clause.

Be It Ordained by the City of St. Louis, as follows:

Section One. As used in this ordinance, the following words shall have the meaning ascribed to them in this section, except where the context clearly indicates or requires a different meaning:

"Association"—A partnership, limited partnership, or any other form of unincorporated business or enterprise, owned by two or more persons.

"Business"—An enterprise, activity, profession, trade or undertaking of any nature conducted for profit or ordinarily conducted for profit, whether by an individual, association, or any other entity other than a corporation.

"City"—The City of St. Louis.

"Collector"—The Collector of the Revenue of The City of St. Louis.

"Corporation"—A corporation or joint stock association organized under the laws of the United States, the State of Missouri, or any other state, territory, or foreign country or dependency.

"Employer"—An individual, association, corporation, (including a corporation not for profit) governmental administration, agency, arm, authority, board, body, branch, bureau, department, division, subdivision, section or unit, or any other entity, who or that employs one or more persons on a salary, wage, commission, or other compensation basis, whether or not such employer is engaged in business as hereinbefore defined.

"Net Profits"—The net income of any association, business or corporation remaining after deducting the necessary expenses of operation from the gross profits or earnings.

"Non-resident"—An individual, association, business, corporation, fiduciary or other entity domiciled outside the City.

"Person"—Every natural person, association, business or fiduciary. Whenever the term "person" is used in any clause prescribing and imposing a penalty, the term, as applied to associations, shall mean the partners thereof, and, as applied to corporations, the officers thereof.

"Resident"—An individual, association, business, corporation, fiduciary or other entity domiciled within the City.

"Taxpayer"—A person, whether an individual, association, business, corporation, fiduciary, or other entity required hereunder to file a return of earnings or net profits, or to pay a tax thereon.

Section Two. A tax for general revenue purposes of one-half of one per centum is hereby imposed on (a) salaries, wages, commissions and other compensation earned after August 31, 1952, by resident individuals of the City,

including the entire distributive share of any member of a partnership or association, less the amount thereof, if any, which may be shown to have been taxed under the provisions hereof to said association or partnership; and on (b) salaries, wages, commissions and other compensation earned after August 31, 1952, by non-resident individuals of the City, for work done or services performed or rendered in the City; and on (c) the net profits earned after August 31, 1952, of associations, businesses, or other activities conducted by a resident or residents, and on (d) the net profits earned after August 31, 1952, of associations, businesses, or other activities conducted in the City by a non-resident or non-residents; and (e) on the net profits earned after August 31, 1952, by all corporations as a result of work done or services performed or rendered, and business or other activities conducted in the City.

Said tax shall first be levied, collected and paid with respect to that portion of salaries, wages, commissions, other compensation and net profits earned after August 31, 1952, and prior to January 1, 1953, and thereafter said tax shall be levied, collected and paid on the basis of the calendar year; provided, however, that where the fiscal year of any person, association, business or corporation differs from the calendar year, the tax shall first be applied to that portion of the net profits for the fiscal year as shall be earned after August 31, 1952, and thereafter on the fiscal year basis.

Section Three. The net profits subject to tax of any corporation, or of any association or business conducted in whole or in part by non-residents of the City, in any case in which the work done, services performed or rendered, and business or other activities conducted are done, performed, rendered or conducted both within and without the City, shall be ascertained as follows, to-wit:

(a) If such taxpayer shall keep its books and records in such a manner as to show the portion of its net profits which is reasonably attributable to work done, services performed or rendered, and business or other activity conducted in the City, then such portion of said net profits shall be subject to said tax.

(b) If the books and records of such taxpayer are not kept in such a manner so as to show the portion of its net profits which is reasonably attributable to work done, services performed or rendered, and business or other activity conducted in the City, then the portion of the entire net profits of such taxpayer subject to tax shall be ascertained by multiplying said entire net profits by an allocation percentage which shall be determined as follows, to-wit:

(1) The percentage which the average value of such taxpayer's real and tangible personal property within the City during the period covered by its return bears to the average value of all its real and tangible personal property wherever situated during such period shall first be ascertained.

(2) The percentage which the gross receipts of such taxpayer derived from business within the City during the period covered by its return bear to the total of such gross receipts wherever derived, shall then be ascertained. Gross receipts derived from business within the City shall be the amount of gross receipts from (a) sales (including also sales of services), except those negotiated or effected in behalf of such taxpayer by agents or agencies, chiefly situated at, connected with, or sent out from premises for the transaction of business owned or rented by such taxpayer outside the City, and (b) rentals or royalties from property situated, or from the use of patents, within the City.

(3) The percentage which the total wages, salaries and other personal service compensation during the period covered by its return, of its employees within the City, except general executive officers, bears to the total wages, salaries and other personal service compensation during such period of all of such taxpayer's employees within and without the City, except general executive officers, shall then be ascertained.

(4) The percentages determined in accordance with subparagraphs 1, 2 and 3 above, or such of the aforesaid paragraphs as shall be applicable to the particular taxpayer's business, shall be added together and the total so obtained shall be divided by the number of percentages used in arriving at said total. The result so obtained shall be the allocation percentage.

(c) If any such taxpayer believes that the methods of allocation or apportionment hereinbefore prescribed have operated or will so operate as to subject it to taxation on a greater portion of its net profits than is reasonably attributable to work done, services performed or rendered, and business or other activities conducted in the City, it shall be entitled to file with the Collector a statement of its objections and of such alternative method of allocation or apportionment as it believes to be proper under the circumstances and in such manner and with such detail and proof and within such time as the Collector may reasonably prescribe; and thereupon if the Collector shall conclude that the methods of allocation or apportionment hereinabove provided are in fact inapplicable or inequitable, he shall redetermine the net profits subject to tax by such other method of allocation or apportionment as seems best calculated to assign to the City for taxation the portion of the net profits reasonably attributable to work done, services performed or rendered, and business or other activities conducted in the City, not exceeding, however, the amount which would be arrived at by the application of the methods of allocation or apportionment hereinabove provided.

Section Four. The earnings subject to tax of any nonresident individual, in any case in which the work done, services performed or rendered, and business or other activities conducted are done, performed, rendered or conducted both within and without the City, shall be ascertained as follows, to-wit:

(a) If the amount of such earnings depends on the volume of business transacted by such individual, then the portion of such earnings subject to tax shall be the portion of such earnings which the volume of business transacted by such individual in the City bears to the volume of business transacted by him within and without the City.

(b) In all other cases, the portion of such earnings subject to tax shall be the portion of such earnings which the total number of working days employed within the City bears to the total number of working days within and without the City.

(c) If it is impracticable to apportion such earnings as aforesaid either because of the peculiar nature of the services of such individual, or on account of the unusual basis of compensation, or for any other reason, then the amount of such earnings reasonably attributable to work done, or services performed or rendered, in the City, shall be determined in accordance with rules or regulations adopted or promulgated by the Collector for the purpose.

Section Five. Except as hereafter provided each individual, association, business, corporation, fiduciary, or other entity, whose earnings or profits are subject to the tax imposed by this ordinance shall, on or before March 30th of each year, unless an extension is granted by the Collector, make and file with the Collector a return, on a form obtainable from the Collector, setting forth the aggregate amount of salaries, wages, commissions, compensation or net profits earned by such taxpayer during the preceding calendar year and subject to the said tax, together with such other pertinent information as the Collector may require:

Provided, however, that where the return is made for a fiscal year different from a calendar year, the said return shall be made within ninety days from the end of the fiscal year, unless an extension is granted by the Collector. Such return shall also show the amount of the tax imposed by this ordinance on such earnings and profits. The taxpayer making the said return shall, at the time of filing thereof, pay to the said Collector the amount of tax shown as due thereon:

Provided, however, that where any portion of the tax so due shall have been deducted at the source and shall have been paid to the Collector by the employer making the said deduction, credit for the amount so paid shall be deducted from the amount shown to be due, and only the balance, if any, shall be due and payable at the time of the filing of said return:

Provided, further, that no return shall be required of any taxpayer who has received only wages, salaries, commissions or other compensation and from which the tax has been withheld at the source, as hereinafter provided. The failure of any employer or any taxpayer to receive or pro-

cure a return form shall not excuse such employer or taxpayer from making a return or paying the tax due.

Section Six. Every employer within the City who employs one or more persons on a salary, wage, commission, or other compensation basis, shall deduct at the time of the payment thereof, the tax of one-half of one per centum of salaries, wages, commissions or other compensation due by the said employer to the said employee and subject to tax, and shall make his return monthly and pay to the said Collector, not later than the last day of each month, the amount of taxes so deducted for the calendar month next preceding the month in which the return is required to be filed. Said return shall be on a form or forms obtainable from the Collector and shall be subject to the rules and regulations prescribed therefor by the said Collector. Every such employer shall furnish each employee with a statement of the amount of the tax withheld. The failure of any employer to deduct or withhold at the source the amount of the tax due from the employee shall not relieve the employee from the duty of making a return and paying the tax.

Section Seven. Every employer collecting and remitting the tax herein provided for on any resident or non-resident employee shall be entitled to deduct and retain three per centum of the total amount so collected as compensation to the employer for collecting and remitting the tax.

Section Eight. The income referred to in Sections 143.120 to 143.150, R. S. Mo. 1949, as not being subject to the state income tax shall not be taxable under this ordinance.

Section Nine. It shall be the duty of the Collector to collect and receive the tax imposed by this ordinance. In addition to keeping the records now required by law and paying over the proceeds from the collection of taxes to the treasurer of the City, as now provided by law, the Collector shall keep an accurate and separate account of all such tax payments received by him, showing the name and address of the taxpayer and the date of the payments. The Collector is hereby charged with the enforcement of the provisions of this ordinance and is hereby empowered to adopt and

promulgate and to enforce rules and regulations relating to any matter or thing pertaining to the administration and enforcement of the provisions of this ordinance, including provisions for the re-examination and correction of returns and payments alleged or found to be incorrect or as to which an overpayment or underpayment is claimed or found to have occurred.

The Collector or any agent or employee authorized in writing by him is hereby authorized to examine the books, papers and records of any employer or supposed employer, or of any taxpayer or supposed taxpayer, in order to verify the accuracy of any return made, or if no return was made, to ascertain the tax imposed by this ordinance. Every such employer or supposed employer, or taxpayer or supposed taxpayer, is hereby directed and required to give to the said Collector or his duly authorized agent or employee the means, facilities and opportunity for such examinations and investigations as are hereby authorized.

The Collector is hereby authorized to examine any person concerning any income which was or should have been returned for taxation and to this end may order the production of books, papers and records and the attendance of all persons before him, whether as parties or witnesses, whom he believes to have knowledge of such income. The refusal of such examination by any employer or taxpayer shall be deemed a violation of this ordinance. Any information obtained as a result of any return, investigation, hearing or verification required or authorized by this ordinance, shall be confidential except for official purposes and except in accordance with judicial order. Any person otherwise divulging such information shall, upon conviction thereof, be deemed guilty of a misdemeanor and shall be subject to a fine of not more than Five Hundred Dollars ($500.00) or imprisonment for not more than six (6) months or both such fine and imprisonment for each offense.

Section Ten. All taxes imposed by this ordinance and remaining unpaid after they have become due shall bear interest at the rate of six per cent (6%) per annum, and the delinquent taxpayer shall be liable for said tax and interest, and, in addition thereto, to a penalty of one per cent (1%)

of the amount of the unpaid tax for each month or fraction of a month for the first six (6) months of delinquency.

Section Eleven. All taxes imposed by this ordinance, together with all interest and penalties, shall be recoverable by the City as other debts of like amounts are recoverable.

Section Twelve. Any person or taxpayer who shall fail, neglect, or refuse to make any return required by this ordinance, or any employer who shall fail, neglect or refuse to withhold or pay over to the City any amount of tax subject to withholding hereunder, or any person or taxpayer who shall refuse to permit the Collector, or his duly authorized deputy or agent, to examine his books, records, or papers, or who shall knowingly make an incomplete, false, or fraudulent return, or who shall attempt to do anything whatsoever to avoid the full disclosure of the amount of earnings or profits, shall be deemed guilty of a misdemeanor and shall be subject to a fine of not more than Five Hundred Dollars ($500.00) or to imprisonment for not more than six (6) months, or to both such fine and imprisonment.

Section Thirteen. If any sentence, clause or section or any part of this ordinance is for any reason held to be unconstitutional, illegal or invalid, such unconstitutionality, illegality or invalidity shall not affect or impair any of the remaining provisions, sentences, clauses, sections or parts of this ordinance. It is hereby declared to be the intent of the Board of Aldermen that this ordinance would have been adopted had such unconstitutional, illegal or invalid sentence, clause, section or part thereof not been included therein.

Section Fourteen. Article XIV of Chapter 23 of the Revised Code of the City of St. Louis, Missouri, 1948, is hereby repealed.

Section Fifteen. This being an ordinance fixing a tax rate, an emergency is hereby declared to exist within the meaning of Section 20 of Article IV of this Charter of the City of St. Louis, and this ordinance shall be effective immediately upon its passage and approval by the Mayor.

Approved: August 28, 1952.

RULES AND REGULATIONS

2. DEFINITIONS

1. Wages shall include salaries, wages, commissions, and other compensation for personal services.

Wages, when not paid for in money, will be measured by the fair market value of the merchandise, stock, bonds, room or board, or other considerations given to the employee.

2. Net Profits. The net income of any association, business or corporation remaining after deducting the necessary expenses of operation from the gross profits or earnings.

1. All of the ordinary and necessary expenses incurred to produce said income, including rentals or other payments required to be made as a condition to the continued use or possession of property to which the taxpayer has not taken or is not taking title, or in which the taxpayer has no equity;

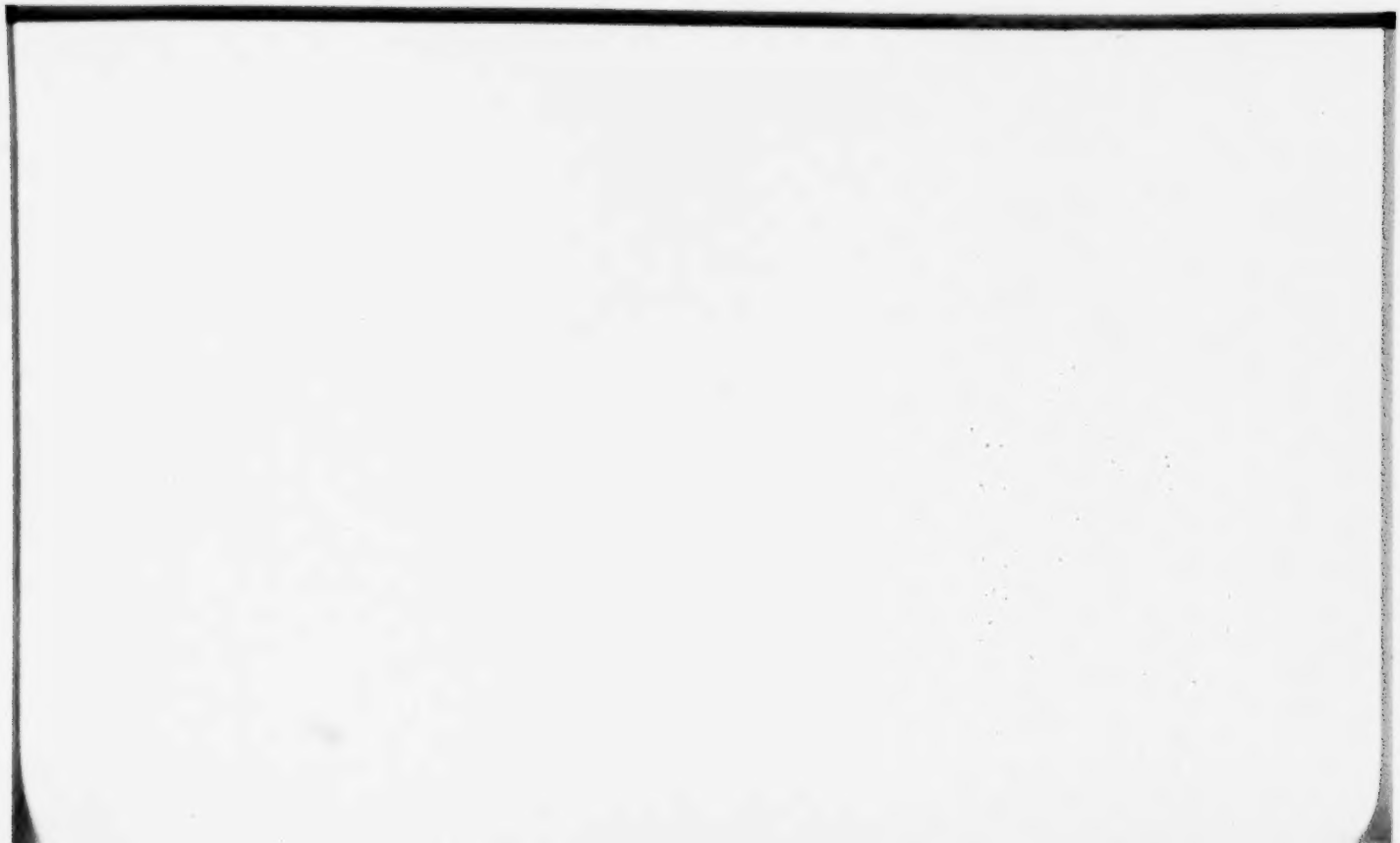
2. All losses, actually sustained in said business, including a reasonable allowance for exhaustion, depreciation, obsolescence, or wear and tear of property in said business;

3. Debts arising from said business actually ascertained to be worthless and charged off within the year;

4. All taxes paid within the year imposed by authority of the United States or its territories or possessions, or under authority of any state, county, school district or municipality or other taxing subdivision of any state, not including those assessed against local benefits and inheritance taxes.

5. All interest paid within the year on taxpayer's indebtedness.

6. Contributions or gifts made by the taxpayer within the taxable year to corporations, associations and societies organized and operated exclusively for religious, charitable, scientific or educational purposes, or for the prevention of cruelty to children and animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, to an amount not in excess of 5 per centum of the amount of the taxpayer's net income on which tax is paid.



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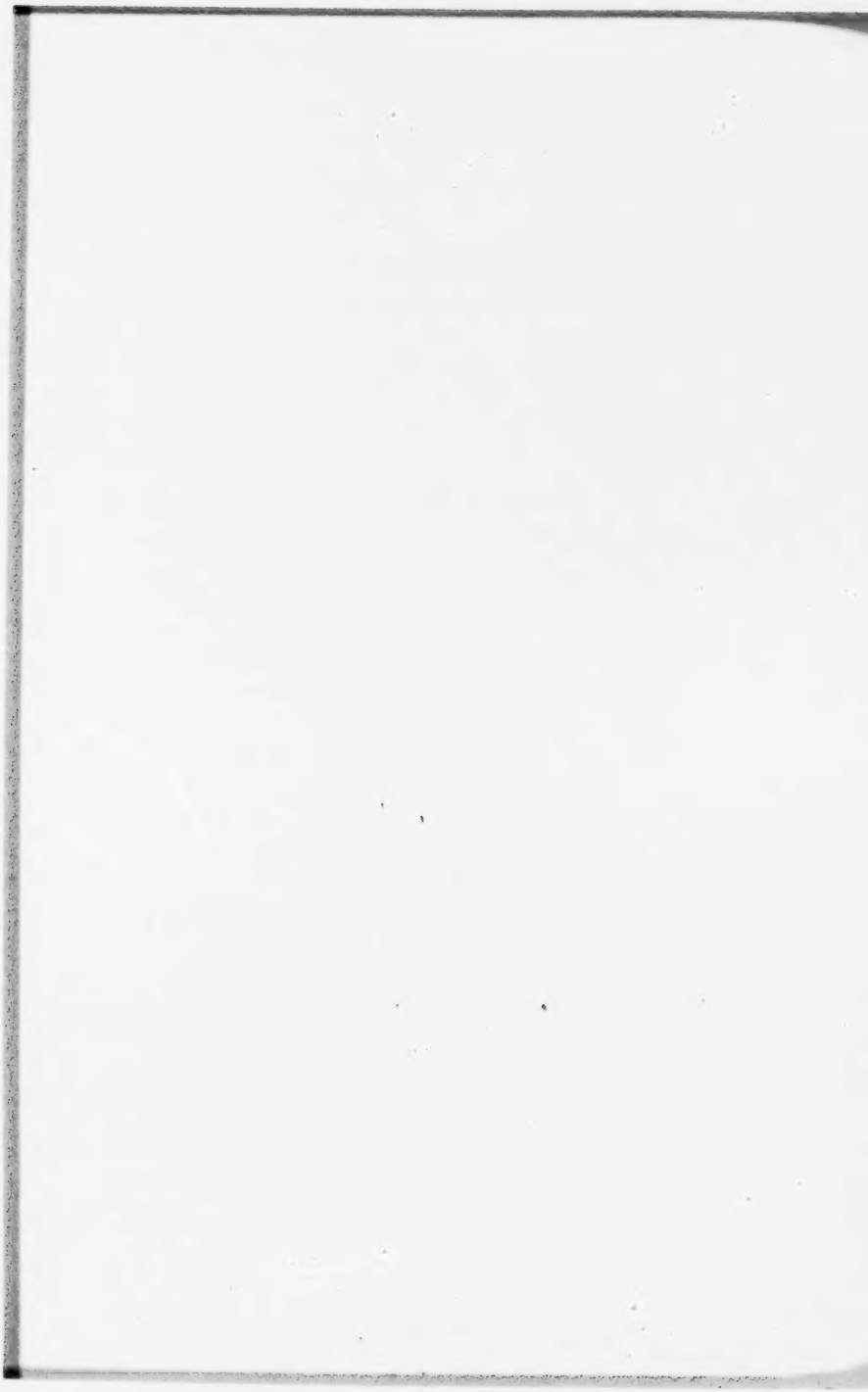

BLEED THROUGH-

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1953.

No. 389.

FRANK WALTERS and EDWARD WILLIAMS, JR.,
Appellants,

vs.

THE CITY OF ST. LOUIS, JOSEPH M. DARST, Mayor,
and DEL L. BANNISTER, Collector,
Appellees.

BRIEF FOR APPELLANTS.

OPINION BELOW.

The opinion of the Supreme Court of Missouri has not yet been reported officially; it has been unofficially reported at 259 S. W. 2d 377.

STATEMENT OF JURISDICTION.

The final judgment of the Supreme Court of Missouri was entered on July 13, 1953 (R. 62). A petition for appeal was presented to the Supreme Court of Missouri, the highest Court of that state, and allowed by the Presiding Judge thereof on September 3, 1953 (R. 63). The suit is one to declare unconstitutional an Ordinance of the City of St. Louis whereby a so-called earnings tax is levied upon appellants and to enjoin the enforcement of said Ordinance by appellees. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: **King**

Manufacturing Co. v. City Council of Augusta, 277 U. S. 100; **Jamison v. Texas,** 318 U. S. 413; **Independent Warehouse, Inc., v. Scheele,** 331 U. S. 70.

The federal questions to be reviewed were raised in the Court of first instance in plaintiff appellants' first pleading wherein the unconstitutionality of the Ordinance (by which said earnings tax is sought to be levied) was alleged on the grounds that it was in violation of the equal protection of the laws requirements of the Fourteenth Amendment to the Constitution of the United States (R. 6, 8). These questions were preserved for appellate review in the state court in appellants' motion for a new trial which was overruled in the trial court and were specified and briefed as assignments of error before the Supreme Court of Missouri (R. 44, 46). In Paragraphs (11), (15) and (16) of appellants' petition, the allegations are made that said Ordinance is arbitrary, unreasonable and discriminatory, and in violation of the equal protection of the laws requirements of the Fourteenth Amendment, and that appellees are attempting illegally to enforce said Ordinance (R. 6, 8, 9). These allegations were denied by appellees in their joint answer and were ruled adversely to appellants by the trial court in its decree of February 5, 1953 (R. 41, 42, 43). Furthermore, such rulings by the trial court were specified as error by appellants in Paragraphs (2) and (5) of their motion for new trial (R. 44, 45). The opinion of the Supreme Court of Missouri considered the federal questions originally presented in appellants' petition and preserved in their motion for new trial (R. 56, 57, 58, 59, 60, 61). With respect to the question of the violation of appellants' equal protection of the laws by virtue of an arbitrary and discriminatory classification whereby wage earners are taxed on gross income or gross receipts without deduction for taxes or operating expenses, and self-employed persons are taxed on a "net profits" measure with taxes (including income taxes) and operating expenses allowed as de-

ductions, the Supreme Court of Missouri found no violation of the Fourteenth Amendment on the ground that the Fourteenth Amendment was not intended to compel the states to adopt an iron rule of equal taxation (R. 60, 61).

In answer to appellants' charge that the earnings tax Ordinance 46222 was unconstitutional and violative of equal protection by virtue of a discriminatory administration against appellants-wage earners, the Missouri Supreme Court ruled adversely to appellants (R. 57, 58). As pointed out above, at the earliest opportunity in appellants' initial pleading it was alleged that the Ordinance was violative of the equal protection clause of the Fourteenth Amendment (R. 6, 8). It was also pleaded that the Ordinance empowered the Collector of the City of St. Louis to promulgate rules and regulations for the administration of the tax and that the appellees were seeking to enforce illegally said Ordinance against appellants by taking into possession funds withheld by their employer; in their prayer appellants asked that appellees be restrained from enforcing said Ordinance (R. 3, 8, 9). Appellants' original pleading was filed on September 12, 1952, in the Circuit Court of the City of St. Louis, Missouri (R. 1). In the Agreed Statement of Facts, Paragraph Three thereof, it was stipulated by the parties that some two weeks prior to the filing of this cause the appellee Del L. Bannister, Collector of the City of St. Louis, had on the day after the passage of the Ordinance—August 28, 1952—issued certain administrative and interpretative regulations pursuant to Section Nine thereof (R. 16, 17). A copy of said Ordinance and regulations was marked Exhibit "A" and incorporated by reference into the record (R. 16, 17). It was also stipulated that it was pursuant to said Ordinance (Exhibit "A") that the appellees claimed the funds withheld from appellants' wages (R. 16, 17). In Regulation 2 of Exhibit "A", issued pursuant to Section Nine of the Ordinance, the "necessary expenses" which the Ordinance

permits self-employed persons to deduct in computing their "net profits" were defined as including: (1) all necessary and ordinary business expenses; (2) all losses sustained in said business, including depreciation; (3) worthless debts arising from said business; (4) all taxes paid which were imposed by authority of the United States or any state, county, school district, or municipality; (5) all interest paid on taxpayer's indebtedness; and (6) charitable contributions not in excess of 5% of the net income (R. 22, 23). The argument was briefed before the Supreme Court of Missouri that, even if the Ordinance was valid on its face, it became unconstitutional by virtue of a discriminatory administration (R. 56, 57). Although the individual wage earner, compensated by a fixed salary, incurs expenses in connection with his job, pays a federal income and local tax, makes charitable contributions, and incurs interest, he is allowed no deductions therefor; on the other hand, the self-employed person is permitted all such deductions whether business-connected or personal. In ruling on this phase of appellants' charge, the Supreme Court of Missouri ruled that the Regulations complained of were not to be treated as part and parcel of the Ordinance; if they were to be so treated, the Court said the Ordinance would become void whenever a Collector promulgated a discriminatory regulation (R. 57). The Court concluded that it would be wholly unreasonable to declare unconstitutional an Ordinance because an administrative agency promulgated a discriminatory rule in attempting to enforce it (R. 58). As an alternate ground for ruling against appellants on the discriminatory administration of the Ordinance, the Court ruled that the question of whether the Regulations were discriminatory was not before the Court (R. 61, 62). It wrote that the action does not seek to have the Ordinance declared unconstitutional because of any administrative or enforcemental rule adopted (R. 57). It also found that the incorporation of the Ordinance and Regulations into the record

and the recital that the funds of appellants' were being withheld pursuant thereto could not inject this issue into the case (R. 58).

QUESTIONS PRESENTED.

1) Where an Ordinance of the City of St. Louis (Ordinance 46222) classifies taxpayers so that gross income is taxed to wage earners and "net profits" (net income after operating expenses, including income taxes) is taxed to self-employed persons, is such Ordinance unconstitutional by virtue of an arbitrary and unreasonable classification and violative of the equal protection of the laws requirement of the Fourteenth Amendment to the Constitution of the United States?

2) Where an administrative officer promulgates a discriminatory regulation to a taxing Ordinance and seeks to enforce said Ordinance under said discriminatory regulation, does the Ordinance itself thereby become void and constitutionally violative of the equal protection of the laws requirements of the Fourteenth Amendment and should the enforcement of the Ordinance be restrained?

3) Where there is an allegation that a taxing Ordinance violates the equal protection of the laws requirements of the Fourteenth Amendment and there is evidence in the record of the intentional and discriminatory administration of said Ordinance against certain taxpayers, can the Supreme Court of any state foreclose review by the United States Supreme Court of said federal question of denial of equal protection of the laws and so defeat the taxpayers' claim of federal right by so-called local practice?

STATUTES INVOLVED.

House Bill No. 50, now Sections 92.110-92.200, R. S. Mo. 1949, V. A. M. S., Ordinance No. 46222, of the City of St. Louis and Regulation 2 thereof are set forth in the Appendix hereto.

STATEMENT.

There is no issue as to the facts of the case, all of which were stipulated by counsel for the parties. Appellants Frank Walters and Edward Williams, Jr., are employed as truck drivers by the Shapleigh Hardware Company, a Missouri Corporation, whose principal place of business is in St. Louis, Missouri (R. 15). They work on an hourly rate and their gross wages, less federal withholding and social security, are paid to them on a weekly basis (R. 16). By virtue of an enabling act of the Missouri General Assembly, referred to as House Bill No. 50 and now known as Sections 92.110-92.200, R. S. Mo. 1949, V. A. M. S., the Board of Aldermen of the City of St. Louis passed a so-called earnings tax ordinance, now known as Ordinance 46222, to take effect on September 1, 1952, whereby a tax is levied upon the gross wages of appellants (R. 16, 22). The Ordinance was passed to raise revenues to meet the inadequacy of existing sources of revenue to enable the City of St. Louis to continue to function both as a city and a county (R. 20). In the fiscal year 1951-1952 the operating deficit of the city amounted to $3,307,138 (R. 21). Established sources of revenue, absent an earnings tax, or an increase of other taxes or a levy of additional taxes, are insufficient to meet the requirements of appropriations as passed by the Board of Aldermen of the City (R. 20, 21). It is under this Ordinance enacted on August 27, 1952, and Regulations promulgated by appellee Bannister, that the appellees make claim to certain funds withheld by Shapleigh Hardware from the wages of appellants (R. 16, 17). To the date of submission of this cause Shapleigh Hardware Company had withheld $5.35 from the wages of appellant Frank Walters and $6.34 from the wages of appellant Edward Williams, Jr., and Shapleigh Hardware will continue to withhold one-half of one per cent from the wages of appellant until some final adjudication with re-

spect to the validity of Ordinance 46222 is obtained (R. 16). By the terms of the earnings tax ordinance, enacted consistent with said enabling act, a tax of one-half of one per cent is imposed on the gross salaries and compensation of all wage earners; it also taxes to the extent of one-half of one per cent the net profits of businesses and associations (R. 31). Section One of the Ordinance defines net profits as "the net income of any association, business or corporation remaining after deducting the necessary expenses of operation from the gross profits or earnings" (R. 34). Pursuant to Section Nine of said Ordinance, appellee Bannister in his official capacity promulgated Regulation 2 (see Appendix) listing as "necessary expenses of operation" (1) all necessary and ordinary business expenses; (2) all losses sustained in said business, including depreciation; (3) worthless debts arising from said business; (4) all taxes paid which were imposed by authority of the United States or any state, county, school district or municipality; (5) all interest paid on taxpayer's indebtedness; and (6) charitable contributions not in excess of 5% of the net income (R. 22, 23). This Regulation was promulgated on August 28, 1952, about three days before the tax levy became effective and was noted as "approved" in copies of the regulations issued to taxpayers (R. 21). On September 12, 1952, appellants filed this action alleging, among other grounds, that the Ordinance was violative of the equal protection of the laws requirement of the Fourteenth Amendment to the Constitution of the United States as being arbitrary, discriminatory and oppressive. These questions were ruled adversely to appellants by Division No. 2 of the Circuit Court of the City of St. Louis in its decree of February 5, 1953 (R. 41, 42, 43). After having preserved these questions for appeal to the Supreme Court of Missouri, appellants' allegations concerning equal protection were denied by the Supreme Court of Missouri in its opinion of June 8, 1953, and overruling of appellants' motion for rehearing on July 13, 1953 (R. 47, 62).

SPECIFICATION OF ERRORS.

Appellants urge as grounds for reversal of the judgment of the Supreme Court of Missouri the following specification of errors:

1) The Supreme Court of Missouri erred in holding and concluding that the classification in Ordinance 46222 taxing gross income to wage earners and "net profits" (after deducting expenses of operation, including income taxes) to self-employed persons is not arbitrary and unreasonable as against appellants wage earners, and thereby not unconstitutional and violative of the equal protection of the laws requirement of the Fourteenth Amendment to the Constitution of the United States.

2) The Supreme Court of Missouri in holding and concluding that an Ordinance is not void and constitutionally violative of the equal protection of the laws requirement of the Fourteenth Amendment to the Constitution of the United States because an administrative officer promulgated a discriminatory regulation and sought to enforce said Ordinance under said discriminatory regulation.

3) The Supreme Court of Missouri erred in holding and concluding that despite evidence in the record of the discriminatory administration of the ordinance against appellants, the denial of the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States was not properly before it and, therefore, said Ordinance could not be held unconstitutional as violative of said Amendment.

SUMMARY OF ARGUMENT.

A. The classification made by Ordinance 46222 taxing gross income (without deductions) from earnings to wage earners and taxing net profits to self-employed persons, partnerships, and corporations (with deductions for necessary expenses of operation, including income taxes) is an arbitrary classification violating the equal protection clause of the Fourteenth Amendment. The classification is based solely upon the legal form and manner of the particular taxpayer's exercise of his right to earn income, which has no fair relation to the announced object of the tax, i. e., the raising of revenue for the City of St. Louis to meet an existing inadequacy. Whether an employed wage earner or self-employed entrepreneur, the taxpayer occupies the same relation toward the exercise of his right to earn; the benefits and protections afforded him by the City of St. Louis are neither more nor less because of the legal form by which he chooses to exercise this right. This is the naked test which determines whether or not a taxpayer will be entitled to avail himself of the statutory deductions. Such a test is an oppressive and discriminatory one and has been so condemned in **Quaker City Cab Company v. Commonwealth of Pennsylvania**, 277 U. S. 389. The purpose of Ordinance 46222 is to raise revenue to meet the requirements of appropriations as passed by the Board of Aldermen of the City of St. Louis; its announced purpose did not contemplate that any discrimination in favor of the self-employed person would compensate for the imposition of some other tax liability upon him or intend that it would encourage persons to become self-employed entrepreneurs in St. Louis or to form partnerships. The deductions allowed the class of non-wage earners, or some practical equivalent, can just as conveniently be granted to the employed earner.

Furthermore, the patent discrimination of Ordinance 46222 is reflected by the statutory definition of the term "net profits" on which the self-employed person is taxed. By the terms of the Ordinance and Regulation 2, issued by the appellee Collector of the City pursuant to authority granted in the Ordinance, the non-wage earner is permitted to deduct as a "necessary expense of operation" all taxes, including federal, state and local income taxes; this deduction, like all other deductions, is denied the wage earner. The allowance to one class of taxpayer (the self-employed) of such a deduction for income taxes and the denial of the same deduction to another class (the employed) cannot be reasonably related to the legitimate end of the taxing Ordinance. Payment of income taxes is as necessary a forced charge and expense to the employed truck driver such as appellants as to the self-employed hauler; in both cases one must pay his income taxes in order to insure his continued ability to remain free to earn. Even the highest appellate courts of those states wherein the general classification between the wage earner and the self-employed has been approved have been careful to limit their holdings to ordinances where no deduction for income taxes is allowed to the class of self-employed persons, **City of Louisville v. Sebree**, 308 Ky. 420, 435, 214 S. W. 2d 248, 256.

B. Ordinance 46222 violates the equal protection clause of the Fourteenth Amendment by virtue of a discriminatory administration of said Ordinance against wage earners as a class and appellants in particular. It administratively bestows great tax advantages upon taxpayers who operate their own businesses while denying these same advantages to employed taxpayers. In Regulation 2 to the Ordinance, the Collector further defines the term "necessary expenses of operation," first referred to in Section One of the Ordinance. In the first three sub-paragraphs of Regulation 2, the Collector confined the deduc-

tions to business-connected expenses, as follows: (1) all ordinary and necessary expenses incurred to produce income; (2) all losses sustained in said business; (3) worthless debts arising from said business. In the last three sub-paragraphs, the limitation that the deduction be business-connected is omitted, as follows: (4) all taxes paid which were imposed by authority of the United States or any state, county, school district, or municipality; (5) all interest paid on taxpayer's indebtedness; (6) charitable contributions not in excess of 5% of the net income. Aside from the discriminatory classification set up in the Ordinance and evidenced by the first four sub-paragraphs of Regulation 2, the discriminatory operation of the Ordinance is amply demonstrated by sub-paragraphs 4, 5, and 6 of the Regulation. The deductibility of these items is not based on any relationship to the self-employed taxpayer's business, being proper deductions even if personal, such as income taxes, interest, and charitable contributions. In contrast, the wage earner cannot deduct his income tax, interest expense and charitable deductions, which may be equal to, and just as personal or as business-connected as the self-employed taxpayer's (i. e., payment of interest and financing charges on purchase of an automobile by an employed travelling salesman, which automobile is used solely on his job and was necessary to the acquisition and retention of the job is not deductible, while a mere change to a self-employed independent contractor status would make the deduction available to him). Regulation 2 is indefensible as a fair one; the administration of Ordinance 46222 under such a Regulation and the withholding of the earnings tax from appellants' wages by Shapleigh Hardware Company is an intentional and systematic discrimination against appellants and wage earners generally. When the entire taxing scheme is viewed from its over-all operational effect, the violation of equal protection is clear and renders the Ordinance unconstitutional and one whose enforcement against appellants

should be restrained. **Iowa-Des Moines Bank v. Bennett,** 284 U. S. 239; **Concordia Insurance Co. v. Illinois,** 292 U. S. 535; **Wheeling Steel Corp. v. Glander,** 337 U. S. 562.

C. The administrative operation of Ordinance 46222 under Regulation 2 is properly before this Court. The Ordinance's denial of equal protection was alleged in the pleadings under which the case was determined. Regulation 2 was made a part of the record to support appellants' claim of denial of equal protection; the Ordinance itself specifically empowered the Collector to promulgate the Regulation. This Court has frequently found it necessary to examine the application given a statute by the authorities who construe it in order to determine whether or not equal protection has been violated. **Concordia Fire Insurance Co. v. Illinois,** 292 U. S. 535; **Wheeling Steel Corp. v. Glander,** 337 U. S. 562; **Yick Wo v. Hopkins,** 118 U. S. 356. The position of the Supreme Court of Missouri (which interposed the procedural deficiency that Regulation 2 was not pleaded as an alternate ground to the denial of appellants' claim of violation of equal protection) is not a sound one in the light of the incorporation of Regulation 2 into the record and appellants' allegation that appellees were attempting to enforce the Ordinance illegally. This Court need not accept as final a state court's construction and interpretation of allegations in a complaint asserting a federal right. **Brown v. Western Ry.,** 338 U. S. 294. To hold otherwise would permit the highest court of any state to prevent the review of federal issues by the United States Supreme Court by an ad hoc application of its own rules of procedure.

ARGUMENT.

A. The Legislative Classification of Ordinance 46222 Taxing Gross Income (Without Deductions) to Wage Earners and Net Profits (With Deductions, Including Income Taxes) to Self-Employed Persons, Partnerships, and Corporations Violates the Equal Protection Clause of the Fourteenth Amendment.

The classification made by Ordinance 46222 taxing gross income (without deductions) from earnings to wage earners and taxing net profits to self-employed persons, partnerships, and corporations, it is submitted, is an arbitrary classification violating the equal protection clause of the Fourteenth Amendment. The subject of the tax is the exercise of the right to earn income either by non-residents within the City of St. Louis or by residents of the City of St. Louis who earn income elsewhere. The tax applies equally to residents and non-residents who are subject to the taxing Ordinance. No discrimination is alleged on this basis. In view of the benefits and protection given to the non-resident taxpayer as well as the resident taxpayer by the City of St. Louis, no claim has been made that the City of St. Louis lacks jurisdiction to tax or violates equal protection by taxing non-residents. Appellants concede that the exercise of the City's police power on behalf of non-resident and resident earners (i. e., preserving to the earner his right to go to and from his place of employment subject to police and fire protection) meets the jurisdictional requirements for the exercise of the taxing power invoked. The fundamental discrimination and violation of equal protection insisted on by appellants is a classification based solely upon the legal form and manner of the particular taxpayer's exercise of his right to earn income; it is urged that such a classification, denying certain deductions to some and allowing the same deductions to others, is based

upon a difference having no substantial or fair relation to the announced object of the tax (i. e., the raising of revenue for the City of St. Louis to meet an existing inadequacy, R. 20, 21) and imposes a burden on employed wage earners from which it exempts self-employed earners, although both classes occupy substantially the same relation toward the subject matter of the taxing statute, that is, the exercise of the right to earn income.

The principles which govern the fairness of classifications made by a state in enacting tax legislation have been frequently announced by this Court. It is their application to particular fact situations, and particularly to the fact situation at hand, which causes dispute. Absolute equality in taxation is not required under the Fourteenth Amendment, **Royster Guano Co. v. Virginia**, 253 U. S. 412, and the power of the state to classify for purposes of taxation is of wide range and flexibility, **Louisville Gas Co. v. Coleman**, 277 U. S. 32. Mere difference is not enough; the classification must rest upon some ground of difference having a fair and substantial relation to the **object** of the legislation so that all persons similarly situated shall be treated alike. The test is whether the statute arbitrarily and without genuine reason imposes a burden upon one group of taxpayers from which it exempts another group, both of them occupying substantially the same relation toward the **subject matter** of the statute, **Colgate v. Harvey**, 296 U. S. 404.[1] There is a presumption of constitutionality favoring the taxing statute which can be overcome only by an explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes, **Madden v. Commonwealth of Kentucky**, 309 U. S. 83.

In the instant question of classification appellants submit that the application of these settled principles results

[1] Overruled on other grounds in **Madden v. Commonwealth of Kentucky**, 309 U. S. 83.

in the demonstration of an arbitrary discrimination as required by **Madden v. Commonwealth of Kentucy**, 309 U. S. 83. Viewing a taxing ordinance as Ordinance 46222 in question here as one whose announced object is the raising of revenue for the City of St. Louis and whose subject is the exercise of the right to earn income, appellants ask upon what difference having a substantial or fair relation to the raising of revenue is the classification based. Appellants contend that there exist differences between the classes wrought; these differences have already been noted by the highest courts of Pennsylvania and Kentucky; see **Dole v. City of Philadelphia**, 337 Pa. 375, 11 A. 2d 163, and **City of Louisville v. Sebree**, 308 Ky. 420, 214 S. W. 2d 248. But such differences as exist are not related to the raising of revenue for the City of St. Louis. Whether an employed wage earner or self-employed entrepreneur, the taxpayer occupies the same relation toward the exercise of his right to earn; the benefits and protection afforded him are no more or no less because of the legal form or character by which he chooses to exercise this right which now happens to be the subject of a tax. Whether a taxpayer under Ordinance 46222 will be taxed on gross income from earnings without deductions or net profits will depend on whether his legal relationship while earning income is that of employee or independent contractor; the "naked and complete test afforded by the statue"[2] is the legal form and character of the earner. Such a test is an oppressive and discriminatory one. This Court has so held in **Quaker City Cab Company v. Commonwealth of Pennsylvania**, 277 U. S. 389. In the **Quaker City Cab** case, the object of the tax was the raising of revenue for the Commonwealth of Pennsylvania. The subject of the tax was the exercise of the right to receive gross receipts by corporations engaged in the public carrier business. Persons in the public carrier business doing business as sole proprietorships or partner-

2 **Colgate v. Harvey**, 296 U. S. 404, 424.

ships were exempt from the tax. The tax was attacked on equal protection grounds as in the instant case. In upholding the taxpayer's contention that, whether an individual, partnership or corporation, all persons in the taxicab business exercising their right to realize gross receipts occupy the same relationship toward the exercise of that right and there was no basis for different treatment of corporations, this Court rejected the character of the owner as the sole fact on which discrimination is made to depend. Although recognizing that there were differences, this Court found that they had no reasonable relation to the subject of the legislation, i. e., the exercise of the right to receive gross receipts in the taxicab business. Significantly, the tax was viewed from its practical operation and effect. It was pointed out that the tax could be laid upon receipts belonging to a natural person as conveniently as upon those of a corporation. Although the taxing statute itself set up only one class of taxpayer, that is, the corporation in the public transportation business, and treated all such corporations similarly within the class, this Court went outside the wording of the statute to its operation to find that in effect it divided those operating taxicabs into two classes, one class made express by the statute and the other inherent from its effect and operation. This Court condemned a statute which, in effect, classifies between competitors and makes the extent of their tax liability dependent upon an unreasonable standard—the legal form and character of the taxpayer-earner. Such is the standard of Ordinance 46222 which appellants submit is similarly violative of the equal protection clause of the Fourteenth Amendment. Whether the taxpayer under this Ordinance be a wage earner, self-employed independent contractor, member of a partnership or a corporation, he exercises his right to earn income with the same benefits and protections as is extended to other taxpayer-earners. The discrimination in favor of the self-employed person is

not intended to compensate for the imposition of some other tax liability upon him; the purpose of the Ordinance is to raise revenue (R. 20, 21) and not to encourage persons to become self-employed entrepreneurs in St. Louis or to form partnerships. The deductions allowed the class of non-wage earners, or some practical equivalent, can just as conveniently be granted to the employed earner.

Furthermore, the arbitrary and unreasonable classification in the instant case is made more patent by the definition given the term "net profits" in Section One of the Ordinance. "Net profits" is defined as "the net income of any association, business or corporation remaining after deducting the necessary expenses of operation from the gross profits or earnings" (R. 34). Section Nine of Ordinance 46222 empowers the Collector to adopt, promulgate, and enforce rules and regulations relating to any matter or thing pertaining to the administration and enforcement of the provisions of the Ordinance (R. 39). Pursuant to Section Nine, the Collector issued Regulation 2, further clarifying the meaning of "net profits" by enumerating what are the "necessary expenses of operation" to be deducted from gross profits (R. 16, 22). This Regulation is incorporated into the record (R. 16, 22); apart from the operative effect of the Regulation (which will be discussed later), it represents evidence of the effect sought to be accomplished by the legislative classification. Among the deductions permitted by sub-paragraph 4 of this Regulation are **all** taxes paid within the year imposed by authority of the United States or its territories or possessions or under authority of any state, county, school district or municipality or other taxing subdivision of any state, not including those assessed against local benefits and inheritance taxes (R. 23). This means that the City's own interpretative Regulation (which is in evidence) contemplates that the self-employed person be permitted to deduct income taxes—

federal, state and local, even the very earnings tax in question—while the wage earner cannot deduct his income taxes. Insofar as sub-paragraph 4 of Regulation 2 allows the deduction of income taxes and other taxes in determining net profits, it is consistent with normal accounting procedure employed to determine the net profits of a particular business; income taxes are universally considered operating expenses and are deductible in determining "net profits." All taxes are forced contributions for the support of government, and are necessary and unavoidable expenses in the conduct of any business. **Dulac Cypress Co. v. Houma Cypress Co.**, 104 So. 722, 158 La. 804; Graham and Katz **Accounting in Law Practice**, pp. 75, 287. In this respect, the Regulation is merely declaratory of the Ordinance which permits the deduction of necessary expenses of operation from gross profits and which says nothing to indicate that taxes shall not be treated in their normal sense as necessary expenses of operation. Thus the legislative classification of the Ordinance is manifestly one which, by its own terms, contemplates the deduction of income taxes by the class paying an earnings tax on net profits and the non-deduction of income taxes by the class of wage earners. Even in those cases decided by the highest courts of Kentucky and Pennsylvania, where the question of arbitrary classification between wage earners and self-employed persons was considered, the ordinances explicitly made income taxes non-deductible, see **City of Louisville v. Sebree**, 308 Ky. 420, 214 S. W. 2d 248, and **Dole v. City of Philadelphia**, 337 Pa. 375, 11 A. 2d 163, and the Kentucky Court in the **Sebree** case made a particular effort to point out that the Ordinance denied any deduction for income taxes. It is just the allowance of such a deduction in Ordinance 46222 as a "necessary expense of operation" which makes that Ordinance's classification discriminatory by its terms; Regulation 2 is merely further evidence of the legislative intent to grant such a deduction. Appellants submit that the

allowance to one class of taxpayer of such a deduction for income taxes as a "necessary expense of operation" and the denial of the same deduction to another class cannot be reasonably related to the legitimate end of the taxing ordinance. Payment of income taxes is as necessary a forced charge and expense to the employed truck driver, such as appellants, as to the self-employed hauler; in both cases one must pay his income taxes in order to insure his continued ability to remain free to earn. Where a deduction for income taxes is allowed to a self-employed person, even the Kentucky Court of Appeals would not contend that the self-employed person's "net profits" are roughly equal to the wage earner's gross earnings, see **City of Louisville v. Sebree**, 308 Ky. 420, 435, 214 S. W. 2d 248, 256. If we assume a case where T is an employed truck driver whose gross wages are $5,000 in 1953, and T-1 is a self-employed truck driver whose net profits before deducting federal income taxes are $5,000, and that both will pay the same federal income tax of $500, we see the discrimination when T must pay his earnings tax under Ordinance 46222 on $5,000 and T-1 pays his earnings tax on $4,500. Such oppressiveness has no relation at all to the proper object of legislation whose purpose is solely to provide revenue, not to regulate, **Royster Guano Co. v. Virginia**, 253 U. S. 412.

B. **The Discriminatory Administration of Ordinance 46222 Against Wage Earners as a Class Renders the Earnings Tax Ordinance Constitutionally Violative of the Equal Protection Clause of the Fourteenth Amendment.**

Ordinance 46222 of the City of St. Louis violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by virtue of a discriminatory administration of said Ordinance against wage earners as a class and appellants in particular, and the appellees should be restrained from enforcing said

Ordinance against appellants. Even if the classification in the Ordinance is not arbitrary and the Ordinance is valid on its face, it becomes unconstitutional on the basis of an administrative bestowal of great tax advantages upon taxpayers who operate their own businesses while denying these same advantages to employed taxpayers. The discriminatory operation of the taxing Ordinance is fully set out in Regulation 2 (R. 22, 23). It has been stipulated that appellee Del L. Bannister, Collector of the City of St. Louis, did on August 28, 1952—three days prior to the effective date of the Ordinance—issue Regulation 2 pursuant to Section Nine of the Ordinance (R. 16, 17). A copy of the Ordinance and Regulations has been marked Exhibit "A" and incorporated by reference into the record (R. 16, 22). It has also been stipulated that it is pursuant to said Ordinance (Exhibit "A") that the appellees claim the funds withheld from appellants' wages (R. 16, 17). In Regulation 2 of Exhibit "A," issued pursuant to Section Nine of the Ordinance, the "necessary expenses" which the Ordinance permits self-employed persons to deduct in computing their "net profits" are defined as including: (1) all necessary and ordinary business expenses incurred to produce income; (2) all losses sustained in said business, including depreciation; (3) worthless debts arising from said business; (4) all taxes paid which were imposed by authority of the United States or any state, county, school district, or municipality; (5) all interest paid on taxpayer's indebtedness; and (6) charitable contributions not in excess of 5% of the net income (R. 22, 23). This Regulation is indefensible as a fair one under which the earnings tax is collected and administered. Its obvious purpose is to define the meaning of the term used in the Ordinance "necessary expenses of operation"; the Collector, unlike the Supreme Court of Missouri, was not willing to let the meaning of that concept change from time to time as "accepted methods of account change" (R. 61, ... Mo. ..., 259 S. W. 2d, l. c. 387). However,

in doing so, the Collector went even further than the Ordinance itself, where the discrimination is at least confined to taxes and other "necessary expenses of operation." Regulation 2 permits the deduction of expenses by the self-employed taxpayer in computing his "net profits" whether the expenses are business-connected or personal, such as **all** interest paid and **all** charitable contributions (R. 23). To illustrate this inequality in the operation of the Ordinance under Regulation 2, compare the tax liability of appellants with self-employed truck drivers having the same annual gross income as appellants. The self-employed truck driver, in computing his taxable income, can deduct **all** ordinary and necessary business expenses, but the employed truck driver can deduct none of his ordinary and necessary business expenses, such as union dues, chauffeur's license, and cost of work clothes. The self-employed truck driver can deduct **all** federal and state income taxes, the very earnings tax which he is paying, and **all** property taxes, real or personal; the deductibility of these taxes is not based on any relationship to the self-employed taxpayers' business, being proper deductions even if personal taxes. The employed truck driver can deduct no taxes under any circumstances. Similarly the self-employed taxpayer can deduct **all** interest paid on indebtedness and **all** charitable contributions not in excess of 5% of his net income; these items are deductible even though non-business and purely personal, for Regulation 2 makes no attempt to confine these latter deductions (specified in sub-paragraphs 4, 5, and 6) to business-connected expenses of operation as it has in the preceding sub-paragraphs of that Regulation (R. 23). But the employed truck driver can deduct no interest of any kind and no charitable deductions (R. 34, 22). Such a Regulation under which the Ordinance is being administered can only be an intentional and systematic discrimination against appellants, and wage earners generally, which renders the Ordinance void and unconstitutional as

to appellants and in violation of the equal protection clause of the Fourteenth Amendment.

This Court in analogous situations has found state tax legislation to abridge the protection of the equal protection clause, and therefore invalid, because of a particular administrative application. In **Iowa Des Moines Bank v. Bennett,** 284 U. S. 239, the facts showed an operative discrimination in the levying of an ad valorem tax on shares of stock of a national bank at 20% of actual value, while the tax upon the shares of competing moneyed domestic corporation was being levied at the rate of only 5 mills on actual value. This discrimination was the result of the acts of the county auditor who wrongfully changed assessments and extended them on his books for the competing domestic corporations at the lower figure. This Court held the favoring of others to be discriminatory and in violation of equal protection; it ordered a refund of the excess of taxes exacted from the National Bank. Similarly, in **Concordia Insurance Co. v. Illinois,** 292 U. S. 535, there was an Illinois statute taxing net receipts of foreign fire, marine and inland navigation insurance companies at the same rate as all other personal property. The evidence showed that the net receipts of these insurance companies were assessed at full value, whereas personal property in general was systematically assessed at 60% of its value with the result that the tax on the insurance companies was disproportionately high. The Supreme Court of Illinois held this action of excessive valuation as construed and applied by the state taxing authorities was valid and that the state taxing statute, when so construed and applied, did not conflict with the equal protection clause and awarded judgment against the insurance company for the full amount of the taxes claimed by Illinois. In reversing the Illinois Court, the majority of this Court concluded that there could be no reasonable basis for such a discrimination. It found that the particular application of the

statute by the state taxing authorities brought it into conflict with the prohibition of the equal protection clause. Whether a state statute is valid or invalid under the equal protection clause of the Fourteenth Amendment often depends on how the statute is construed and applied; it is under such an oppressive construction and application against appellants that appellees have promulgated Regulation 2 and seek to collect the monies now withheld by Shapleigh Hardware Company from appellants' wages. It is submitted that such enforcement should be restrained as violative of the equal protection of appellants as wage earners.

Another situation wherein this Court considered the entire taxing scheme, including administrative operation, rather than the mere wording of the statute itself, is presented by **Wheeling Steel Corp. v. Glander**, 337 U. S. 562. Here, the Department of Taxation of Ohio instituted certain policies and practices, pursuant to its own construction of the state ad valorem tax statute, whereby resident corporations were allowed exemptions not available to foreign corporations. In examining the discriminatory aspects of this tax in the light of the equal protection clause, the Court consistently referred to the over-all Ohio taxing scheme, including the taxing authorities' administrative action and policy, and ultimately held that the Department's activities in administering this tax contravened equal protection requirements, thereby rendering the tax assessments invalid. A similar administrative activity is present in the instant fact situation, wherein the Collector of the City of St. Louis promulgated Regulations to govern the collection and payment of the City Earnings Tax. Like the policies framed by the Ohio Department of Taxation in the **Wheeling** case, these Regulations prescribe exemptions for a certain class, which manifestly antagonize the equal protection clause. If the method of analysis in the **Wheeling** case is correct, and the entire taxing scheme

is the proper subject for judicial scrutiny, the Court in the instant case should consider not only the City Earnings Tax Ordinance itself, but also the effect of these detailed interpretative and operative regulations issued by the Collector which appellants contend are so grossly discriminatory.

C. **The Question of the Discriminatory Administration of Ordinance 46222 in Violation of the Equal Protection Clause of the Fourteenth Amendment Is Amply Raised by the Record and Is a Claim of Federal Right, Review of Which Cannot Be Foreclosed by So-called Local Practice.**

The Supreme Court of Missouri in its decision below concluded that the issue of discrimination effected by the Collector's Regulations was not properly raised by the pleadings, inasmuch as appellants' petition contained no such allegations in regard to the Regulations, the charge being levied solely against Ordinance 46222 and that state statute which authorized it. Hence, although it considered the question on its merits and found no discrimination, the Missouri Supreme Court interposed this procedural deficiency as an alternate ground to the denial of appellants' claim of the violation of the equal protection clause. Preliminary to a consideration of the merits of this objection, appellants call to this court's attention its own doctrine that the Supreme Court of the United States need not accept as final a state court's construction and interpretation of allegations in a complaint asserting a federal right, **Brown v. Western Ry.**, 338 U. S. 294; this should be particularly true when such local interpretation would foreclose this Court from consideration of the particular federal question, i. e., whether or not there has been a denial of equal protection of the laws. To hold otherwise would permit the highest court of any state to prevent the review of federal issues by the United States Supreme Court by an ad hoc application of its own rules of procedure.

Considering briefly the substance of the procedural objection, appellants contend that a well-pleaded challenge to the constitutionality of a revenue statute based upon a violation of equal protection under the Fourteenth Amendment brings under judicial scrutiny the entire taxing scheme established by the act. Indeed, this Court has frequently found it necessary to examine the application given the statute by the authorities who construe it in order to determine whether or not equal protection has been violated, **Concordia Fire Insurance Co. v. Illinois**, 292 U. S. 535; **Wheeling Steel Corp. v. Glander**, 337 U. S. 562; **Yick Wo v. Hopkins**, 118 U. S. 356. Not only the naked provisions of the legislative enactment, but also the effect on the taxpayer of its enforcement are raised by a claim of denial of equal protection. When, as here, the Ordinance specifically provides for the promulgation by the Collector of such Regulations to administer the tax (R. 39) and such **Regulations are made part of the record** to support the taxpayer's claim of denial of equal protection (R. 16, 17, 22-23), the statute, in its terms and operations, is before a Court whose inquiry is addressed to equal protection. There is no justification for confining the pleader's allegations of the Ordinance's violation of equal process to the formal wording of the statute as distinguished from its operational effect. (See Appellants' First Amended Petition, Paragraphs 15 and 16, R. 8, 9.)

CONCLUSION.

For the foregoing reasons appellants request this Court to adjudge and decree that Ordinance 46222 of the City of St. Louis is illegal and void by virtue of an oppressive classification in violation of the equal protection clause of the Fourteenth Amendment, that the administrative operation of said Ordinance as against appellants renders it violative of their constitutional rights to equal protection of the laws, and that appellees be restrained and enjoined

perpetually from collecting or attempting to collect said earnings tax from appellants, and that whatever monies have been withheld from appellants' wages be returned to them.

Respectfully submitted,

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APPENDIX.

CHAPTER 92.

R. S. Mo., 1949, V. A. M. S.

Taxation in St. Louis and Kansas City.

92.110. Tax May Be Levied on Earnings and Profits (St. Louis).

Any constitutional charter city in this state which now has or may hereafter acquire a population in excess of seven hundred thousand inhabitants, according to the last federal decennial census, is hereby authorized to levy and collect, by ordinance for general revenue purposes, an earnings tax on the salaries, wages, commissions and other compensation earned by its residents; on the salaries, wages, commissions and other compensation earned by nonresidents of the city for work done or services performed or rendered in the city; on the net profits of associations, businesses or other activities conducted by residents; on the net profits of associations, businesses or other activities conducted in the city by nonresidents; and on the net profits earned by all corporations as the result of work done or services performed or rendered and business or other activities conducted in the city. Laws 1951, p. ..., H. S. H. B. No. 50, Section 1.

92.120. Tax Rate Limits (St. Louis).

The tax on salaries, wages, commissions and other compensation or individuals, subject to tax, and on the net profits or earnings of associations, businesses or other activities, and corporations, subject to tax, shall not be in excess of one per centum per annum. Laws 1951, p. ..., H. S. H. B. No. 50, Section 4.

92.130. **Income Exempt From State Income Tax Not to Be Taxed (St. Louis).**

The income referred to in Sections 143.120 to 143.150, R. S. Mo. 1949, as not being subject to state income tax shall not be taxable under any tax ordinance enacted pursuant to the provisions of Sections 92.110 to 92.200. Laws 1951, p. ..., H. S. H. B. No. 50, Section 6.

92.140. **Exemptions and Deductions From Tax May Be Authorized by City (St. Louis).**

The municipal assembly of any such city may provide for deductions and exemptions from salaries, wages and commissions of employees and may provide for exemptions on account of the wives, husbands and dependents of such employees. Laws 1951, p. ..., H. S. H. B. No. 50, Section 2.

92.150. **Net Profits, How Ascertained (St. Louis).**

The net profits or earnings of associations, businesses or other activities, and corporations shall be ascertained and determined by deducting the necessary expense of operation from the gross profits or earnings. Laws 1951, p. ..., H. S. H. B. No. 50, Section 1.

92.160. **Tax Ordinance to Contain Formulae for Taxing Profits of Nonresident (St. Louis).**

The earnings or net profits subject to tax of any nonresident individual, of any association or business conducted by nonresidents, or of any corporation, in any case in which the work done, services performed or rendered, and business or other activities conducted are done, performed, rendered or conducted both within and without the city may be ascertained by formulae set forth in any ordinance enacted pursuant to sections 92.110 to 92.200

or prescribed by rules or regulations adopted pursuant to such ordinance. Laws 1951, p. ..., H. S. H. B. No. 50, Section 5.

92.170. **Employers May Be Required to Collect Tax—Allowance (St. Louis).**

Any such city is hereby authorized to impose upon employers the duty of collecting and remitting to the city any tax that may be levied upon the earnings of employees pursuant to sections 92.110 to 92.200, and to prescribe penalties for failure to perform such duty. In the event that any such city should impose such duty on employers, each such employer shall be entitled to deduct and retain three per cent of the total amount collected to compensate such employer for collecting such tax. Laws 1951, p. ...., H. S. H. B. No. 50, Section 7.

92.180. **Wage Brackets May Be Established (St. Louis.)**

In order to facilitate the collection of the tax herein authorized, any such city may by ordinance create wage brackets within which the tax shall be uniform for taxpayers entitled to the same number of exemptions. Laws 1951, p. ...., H. S. H. B. No. 50, Section 8.

92.190. **Tax Ordinance Not to Require Copies of Federal or State Income Tax Returns (St. Louis).**

No tax ordinance enacted pursuant to the provisions of sections 92.110 to 92.200 shall require any taxpayer to file copies of his state or federal income tax returns with any city officer, employee or other person designated by said ordinance to collect or otherwise administer any tax imposed thereunder. Laws 1951, p. ...., H. S. H. B. No. 50, Section 9.

92.200. **Law to Expire, When.**

The provisions of sections 92.110 to 92.200 shall expire April 1, 1954. Laws 1951, p. ...., H. S. H. B. No. 50, Section 11.

Ordinance 46222 of the City of St. Louis.

An Ordinance levying and imposing an earnings tax for general revenue purposes of one-half of one per cent on salaries, wages, commissions and other compensation earned after August 31, 1952, by residents of the City of St. Louis; on salaries, wages, commissions and other compensation earned after August 31, 1952, by non-residents of the City, for work done or services performed or rendered in the City; on the net profits earned after August 31, 1952, of associations, businesses, or other activities conducted by a resident or residents of the City; on the net profits earned after August 31, 1952, of associations, businesses, or other activities conducted in the City by a non-resident or non-residents; and on the net profits earned after August 31, 1952, by all corporations as a result of work done or services performed or rendered and business or other activities conducted in the City; prescribing a formula for the ascertainment of the net profits subject to tax of any corporation, or association or business conducted in whole or in part by non-residents of the City, in any case in which the work done, services performed or rendered, and business or other activities conducted are done, performed, rendered, or conducted both within and without the City; authorizing any such taxpayer to file with the Collector an application for an alternative method of allocation or apportionment of the net profits reasonably attributable to work done, services performed or rendered, and business or other activities conducted in the City; prescribing a formula for the ascertainment of earnings subject to tax of any non-resident individual in any case in which the work done, services performed or rendered, and business or other activities con-

ducted are done, performed, rendered or conducted both within and without the City, and empowering the Collector to determine by rule or regulation a different apportionment of such earnings as are reasonably attributable to work done, or services performed or rendered in the City in cases where the services rendered are of a peculiar nature, or where the basis of compensation is unusual, or for any other reason; providing for the filing of returns and payment of the tax by individuals, associations, businesses, corporations, fiduciaries, and other entities, and for the furnishing of information by such taxpayers and by employers; imposing on employers the duty of collecting the tax at the source; prescribing the duties and powers of the Collector; providing for interest and penalties on delinquencies; providing that the divulgence of confidential information or the failure, neglect, or refusal to make any return required under this ordinance, or the failure, neglect, or refusal of any employer to withhold or pay over to the City any amount of tax subject to withholding under this ordinance, or the refusal to permit authorized examinations by the Collector, or the making, knowingly, of any incomplete, false, or fraudulent return, or the attempt to do anything whatsoever, to avoid the full disclosure of the amount of earnings or profits, shall constitute a misdemeanor; providing generally for the administration and enforcement of this ordinance and the collection of the tax; empowering the Collector to promulgate necessary rules and regulations for the administration of the tax; providing that income exempt from the state income tax laws shall be exempt from taxation under the provisions of this ordinance; authorizing every employer collecting and remitting the tax to deduct and retain therefrom three per cent (3%) of the total amount withheld by such employer; containing a separability clause; repealing Article XIV of Chapter 23 of the Revised Code of the City of St. Louis, Missouri, 1948; and containing an emergency clause.

Be It Ordained by the City of St. Louis, as follows:

Section One. As used in this ordinance, the following words shall have the meaning ascribed to them in this section, except where the context clearly indicates or requires a different meaning:

"Association"—A partnership, limited partnership, or any other form of unincorporated business or enterprise, owned by two or more persons.

"Business"—An enterprise, activity, profession, trade or undertaking of any nature conducted for profit or ordinarily conducted for profit, whether by an individual, association, or any other entity other than a corporation.

"City"—The City of St. Louis.

"Collector"—The Collector of the Revenue of The City of St. Louis.

"Corporation"—A corporation or joint stock association organized under the laws of the United States, the State of Missouri, or any other state, territory, or foreign country or dependency.

"Employer"—An individual, association, corporation, (including a corporation not for profit) governmental administration, agency, arm, authority, board, body, branch, bureau, department, division, subdivision, section or unit, or any other entity, who or that employs one or more persons on a salary, wage, commission, or other compensation basis, whether or not such employer is engaged in business as hereinbefore defined.

"Net Profits"—The net income of any association, business or corporation remaining after deducting the necessary expenses of operation from the gross profits or earnings.

"Non-resident"—An individual, association, business, corporation, fiduciary or other entity domiciled outside the City.

"Person"—Every natural person, association, business or fiduciary. Whenever the term "person" is used in any clause prescribing and imposing a penalty, the term, as applied to associations, shall mean the partners thereof, and, as applied to corporations, the officers thereof.

"Resident"—An individual, association, business, corporation, fiduciary or other entity domiciled within the City.

"Taxpayer"—A person, whether an individual, association, business, corporation, fiduciary, or other entity required hereunder to file a return of earnings or net profits, or to pay a tax thereon.

Section Two. A tax for general revenue purposes of one-half of one per centum is hereby imposed on (a) salaries, wages, commissions and other compensation earned after August 31, 1952, by resident individuals of the City, including the entire distributive share of any member of a partnership or association, less the amount thereof, if any, which may be shown to have been taxed under the provisions hereof to said association or partnership; and on (b) salaries, wages, commissions and other compensation earned after August 31, 1952, by non-resident individuals of the City, for work done or services performed or rendered in the City; and on (c) the net profits earned after August 31, 1952, of associations, businesses, or other activities conducted by a resident or residents, and on (d) the net profits earned after August 31, 1952, of associations, businesses, or other activities conducted in the City by a non-resident or non-residents; and (e) on the net profits earned after August 31, 1952, by all corporations as a result of work done or services performed or rendered, and business or other activities conducted in the City.

Said tax shall first be levied, collected and paid with respect to that portion of salaries, wages, commissions, other compensation and net profits earned after August 31, 1952, and prior to January 1, 1953, and thereafter said tax

shall be levied, collected and paid on the basis of the calendar year; provided, however, that where the fiscal year of any person, association, business or corporation differs from the calendar year, the tax shall first be applied to that portion of the net profits for the fiscal year as shall be earned after August 31, 1952, and thereafter on the fiscal year basis.

Section Three. The net profits subject to tax of any corporation, or of any association or business conducted in whole or in part by non-residents of the City, in any case in which the work done, services performed or rendered, and business or other activities conducted are done, performed, rendered or conducted both within and without the City, shall be ascertained as follows, to-wit:

(a) If such taxpayer shall keep its books and records in such a manner as to show the portion of its net profits which is reasonably attributable to work done, services performed or rendered, and business or other activity conducted in the City, then such portion of said net profits shall be subject to said tax.

(b) If the books and records of such taxpayer are not kept in such a manner so as to show the portion of its net profits which is reasonably attributable to work done, services performed or rendered, and business or other activity conducted in the City, then the portion of the entire net profits of such taxpayer subject to tax shall be ascertained by multiplying said entire net profits by an allocation percentage which shall be determined as follows, to-wit:

(1) The percentage which the average value of such taxpayer's real and tangible personal property within the City during the period covered by its return bears to the average value of all its real and tangible personal property wherever situated during such period shall first be ascertained.

(2) The percentage which the gross receipts of such taxpayer derived from business within the City during the period covered by its return bear to the total of such gross receipts wherever derived, shall then be ascertained. Gross receipts derived from business within the City shall be the amount of gross receipts from (a) sales (including also sales of services), except those negotiated or effected in behalf of such taxpayer by agents or agencies, chiefly situated at, connected with, or sent out from premises for the transaction of business owned or rented by such taxpayer outside the City, and (b) rentals or royalties from property situated, or from the use of patents, within the City.

(3) The percentage which the total wages, salaries and other personal service compensation during the period covered by its return, of its employees within the City, except general executive officers, bears to the total wages, salaries and other personal service compensation during such period of all of such taxpayer's employees within and without the City, except general executive officers, shall then be ascertained.

(4) The percentages determined in accordance with subparagraphs 1, 2 and 3 above, or such of the aforesaid paragraphs as shall be applicable to the particular taxpayer's business, shall be added together and the total so obtained shall be divided by the number of percentages used in arriving at said total. The result so obtained shall be the allocation percentage.

(c) If any such taxpayer believes that the methods of allocation or apportionment hereinbefore prescribed have operated or will so operate as to subject it to taxation on a greater portion of its net profits than is reasonably attributable to work done, services performed or rendered, and business or other activities conducted in the City, it shall be entitled to file with the Collector a statement of its

objections and of such alternative method of allocation or apportionment as it believes to be proper under the circumstances and in such manner and with such detail and proof and within such time as the Collector may reasonably prescribe; and thereupon if the Collector shall conclude that the methods of allocation or apportionment hereinabove provided are in fact inapplicable or inequitable, he shall redetermine the net profits subject to tax by such other method of allocation or apportionment as seems best calculated to assign to the City for taxation the portion of the net profits reasonably attributable to work done, services performed or rendered, and business or other activities conducted in the City, not exceeding, however, the amount which would be arrived at by the application of the methods of allocation or apportionment hereinabove provided.

Section Four. The earnings subject to tax of any nonresident individual, in any case in which the work done, services performed or rendered, and business or other activities conducted are done, performed, rendered or conducted both within and without the City, shall be ascertained as follows, to-wit:

(a) If the amount of such earnings depends on the volume of business transacted by such individual, then the portion of such earnings subject to tax shall be the portion of such earnings which the volume of business transacted by such individual in the City bears to the volume of business transacted by him within and without the City.

(b) In all other cases, the portion of such earnings subject to tax shall be the portion of such earnings which the total number of working days employed within the City bears to the total number of working days within and without the City.

(c) If it is impracticable to apportion such earnings as aforesaid either because of the peculiar nature of the services of such individual, or on account of the unusual basis

of compensation, or for any other reason, then the amount of such earnings reasonably attributable to work done, or services performed or rendered, in the City, shall be determined in accordance with rules or regulations adopted or promulgated by the Collector for the purpose.

Section Five. Except as hereafter provided each individual, association, business, corporation, fiduciary, or other entity, whose earnings or profits are subject to the tax imposed by this ordinance shall, on or before March 30th of each year, unless an extension is granted by the Collector, make and file with the Collector a return, on a form obtainable from the Collector, setting forth the aggregate amount of salaries, wages, commissions, compensation or net profits earned by such taxpayer during the preceding calendar year and subject to said tax, together with such other pertinent information as the Collector may require:

Provided, however, that where the return is made for a fiscal year different from a calendar year, the said return shall be made within ninety days from the end of the fiscal year, unless an extension is granted by the Collector. Such return shall also show the amount of the tax imposed by this ordinance on such earnings and profits. The taxpayer making the said return shall, at the time of filing thereof, pay to the said Collector the amount of tax shown as due thereon:

Provided, however, that where any portion of the tax so due shall have been deducted at the source and shall have been paid to the Collector by the employer making the said deduction, credit for the amount so paid shall be deducted from the amount shown to be due, and only the balance, if any, shall be due and payable at the time of the filing of said return:

Provided, further, that no return shall be required of any taxpayer who has received only wages, salaries, commis-

sions or other compensation and from which the tax has been withheld at the source, as hereinafter provided. The failure of any employer or any taxpayer to receive or procure a return form shall not excuse such employer or taxpayer from making a return or paying the tax due.

Section Six. Every employer within the City who employs one or more persons on a salary, wage, commission, or other compensation basis, shall deduct at the time of the payment thereof the tax of one-half of one per centum of salaries, wages, commissions or other compensation due by the said employer to the said employee and subject to tax, and shall make his return monthly and pay to the said Collector, not later than the last day of each month, the amount of taxes so deducted for the calendar month next preceding the month in which the return is required to be filed. Said return shall be on a form or forms obtainable from the Collector and shall be subject to the rules and regulations prescribed therefor by the said Collector. Every such employer shall furnish each employee with a statement of the amount of the tax withheld. The failure of any employer to deduct or withhold at the source the amount of the tax due from the employee shall not relieve the employee from the duty of making a return and paying the tax.

Section Seven. Every employer collecting and remitting the tax herein provided for on any resident or non-resident employee shall be entitled to deduct and retain three per centum of the total amount so collected as compensation to the employer for collecting and remitting the tax.

Section Eight. The income referred to in Sections 143.120 to 143.150, R. S. Mo. 1949, as not being subject to the state income tax shall not be taxable under this ordinance.

Section Nine. It shall be the duty of the Collector to collect and receive the tax imposed by this ordinance. In addi-

tion to keeping the records now required by law and paying over the proceeds from the collection of taxes to the treasurer of the City, as now provided by law, the Collector shall keep an accurate and separate account of all such tax payments received by him, showing the name and address of the taxpayer and the date of the payments. The Collector is hereby charged with the enforcement of the provisions of this ordinance and is hereby empowered to adopt and promulgate and to enforce rules and regulations relating to any matter or thing pertaining to the administration and enforcement of the provisions of this ordinance, including provisions for the re-examination and correction of returns and payments alleged or found to be incorrect or as to which an overpayment or underpayment is claimed or found to have occurred.

The Collector or any agent or employee authorized in writing by him is hereby authorized to examine the books, papers and records of any employer or supposed employer, or of any taxpayer or supposed taxpayer, in order to verify the accuracy of any return made, or if no return was made, to ascertain the tax imposed by this ordinance. Every such employer or supposed employer, or taxpayer or supposed taxpayer, is hereby directed and required to give to the said Collector or his duly authorized agent or employee the means, facilities and opportunity for such examinations and investigations as are hereby authorized.

The Collector is hereby authorized to examine any person concerning any income which was or should have been returned for taxation and to this end may order the production of books, papers and records and the attendance of all persons before him, whether as parties or witnesses, whom he believes to have knowledge of such income. The refusal of such examination by any employer or taxpayer shall be deemed a violation of this ordinance. Any information obtained as a result of any return, investigation, hearing or

verification required or authorized by this ordinance, shall be confidential except for official purposes and except in accordance with judicial order. Any person otherwise divulging such information shall, upon conviction thereof, be deemed guilty of a misdemeanor and shall be subject to a fine of not more than Five Hundred Dollars ($500.00) or imprisonment for not more than six (6) months or both such fine and imprisonment for each offense.

Section Ten. All taxes imposed by this ordinance and remaining unpaid after they have become due shall bear interest at the rate of six per cent (6%) per annum, and the delinquent taxpayer shall be liable for said tax and interest, and, in addition thereto, to a penalty of one per cent (1%) of the amount of the unpaid tax for each month or fraction of a month for the first six (6) months of delinquency.

Section Eleven. All taxes imposed by this ordinance, together with all interest and penalties, shall be recoverable by the City as other debts of like amounts are recoverable.

Section Twelve. Any person or taxpayer who shall fail, neglect, or refuse to make any return required by this ordinance, or any employer who shall fail, neglect or refuse to withhold or pay over to the City any amount of tax subject to withholding hereunder, or any person or taxpayer who shall refuse to permit the Collector, or his duly authorized deputy or agent, to examine his books, records, or papers, or who shall knowingly make an incomplete, false, or fraudulent return, or who shall attempt to do anything whatsoever to avoid the full disclosure of the amount of earnings or profits, shall be deemed guilty of a misdemeanor and shall be subject to a fine of not more than Five Hundred Dollars ($500.00) or to imprisonment for not more than six (6) months, or to both such fine and imprisonment.

Section Thirteen. If any sentence, clause or section or any part of this ordinance is for any reason held to be un-

constitutional, illegal or invalid, such unconstitutionality, illegality or invalidity shall not affect or impair any of the remaining provisions, sentences, clauses, sections or parts of this ordinance. It is hereby declared to be the intent of the Board of Aldermen that this ordinance would have been adopted had such unconstitutional, illegal or invalid sentence, clause, section or part thereof not been included therein.

Section Fourteen. Article XIV of Chapter 23 of the Revised Code of the City of St. Louis, Missouri, 1948, is hereby repealed.

Section Fifteen. This being an ordinance fixing a tax rate, an emergency is hereby declared to exist within the meaning of Section 20 of Article IV of this Charter of the City of St. Louis, and this ordinance shall be effective immediately upon its passage and approval by the Mayor.

Approved: August 28, 1952.

Rules and Regulations to Ordinance 46222.

2. **Definitions.**

1. Wages shall include salaries, wages, commissions, and other compensation for personal services.

Wages, when not paid for in money, will be measured by the fair market value of the merchandise, stock, bonds, room or board, or other considerations given to the employee.

2. Net Profits. The net income of any association, business or corporation remaining after deducting the necessary expenses of operation from the gross profits or earnings.

1. All of the ordinary and necessary expenses incurred to produce said income, including rentals or other payments

required to be made as a condition to the continued use or possession of property to which the taxpayer has not taken or is not taking title, or in which the taxpayer has no equity;

2. All losses, actually sustained in said business, including a reasonable allowance for exhaustion, depreciation, obsolescence, or wear and tear of property in said business;

3. Debts arising from said business actually ascertained to be worthless and charged off within the year;

4. All taxes paid within the year imposed by authority of the United States or its territories or possessions, or under authority of any state, county, school district or municipality or other taxing subdivision of any state, not including those assessed against local benefits and inheritance taxes.

5. All interest paid within the year on taxpayer's indebtedness.

6. Contributions or gifts made by the taxpayer within the taxable year to corporations, associations and societies organized and operated exclusively for religious, charitable, scientific or educational purposes, or for the prevention of cruelty to children and animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, to an amount not in excess of 5 per centum of the amount of the taxpayer's net income on which tax is paid.

No. 389.

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October Term, 1953.

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Appellants,

vs.

THE CITY OF ST. LOUIS, JOSEPH M. DARST,
Mayor, and DEL L. BANNISTER, Collector,
Appellees.

CERTIFICATE OF SERVICE.

Receipt is hereby acknowledged of two copies of the brief of Appellants in the above-entitled cause on Monday, January 11, 1954.

John P. McCammon,
Attorney for Appellees.

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Appellees.

REPLY BRIEF FOR APPELLANTS.

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Appellees.

REPLY BRIEF FOR APPELLANTS.

A. **The Classification Taxing Gross Earnings to Wage Earners and Net Profits to Others Cannot Be Justified on Grounds of Administrative Convenience.**

Appellees in their brief do not deny that the statutory definition of "net profits" in Ordinance 46222 contemplates that federal income taxes shall be deductible as a necessary expense of operation by the self-employed independent contractor in particular and the class of non-wage earners generally. On the one hand, they contend that

because there has been no prior adjudication of such deductibility, they should not be visited with the sins of the plain wording of Ordinance 46222 and the legislative intent evidenced by Regulation 2; on the other hand, they take the position that the classification is not arbitrary despite the fact that the Ordinance permits the class of non-wage earners to deduct federal income taxes as a necessary expense of operation. Appellees concede the fundamental difference between Ordinance 46222 and those ordinances considered in **Dole v. City of Philadelphia**, 337 Pa. 375, 11 A. 2d 163, and **City of Louisville v. Sebree**, 308 Ky. 420, 214 S. W. 2d 248, where such a deduction was specifically prohibited by the terms of the ordinances involved. They reiterate the conceded differences between wage earners and self-employed persons, but fail to show how these differences are related to the object of the taxing ordinance. They seek to justify the classification in Ordinance 46222 primarily on principles of administrative convenience, relying on **Carmichael v. Southern Coal and Coke Company**, 301 U. S. 495. In the **Carmichael** case, this Court held that considerations of administrative convenience would justify differences between the treatment of small taxpayers and that meted out to others. The object of the taxing statute was the raising of sufficient revenue to set up a comprehensive scheme for providing unemployment benefits for workers employed within the state. Having accepted the basic premise that the difference in treatment was between the small taxpayers and other taxpayers, this Court found, in effect, that the difference in treatment accorded the small taxpayer had some fair relation to the object of the taxing statute in that the expense and inconvenience of collecting the tax from small employers could well have been (in the legislature's opinion) so disproportionate to the revenue obtained as to make it economically not feasible considering the financial requirements of the unemployment benefits fund.

In the instant case, conceding that there is no substantial difference between raising revenue to meet the financial requirements of the City of St. Louis and to meet the requirements of a state unemployment benefits fund, still appellants contend that the fallacy in appellees' reliance on the **Carmichael** case is their basic premise that all wage earners and commission earners, like the employers exempt from the Alabama unemployment tax, are small taxpayers and that the expense of auditing their returns and perhaps mailing refunds in certain cases is so related to the object of the tax—in a disproportionate way, of course—as to make the taxing of wage earners and commission earners (and the revenue realized) economically unsound. Such a premise and assumption is not only unproven, but false and unreasonable; common knowledge and experience dictate that the term wage earner does not necessarily connote small income. The incomes of wage earners and commission earners, like corporations, partnerships, and self-employed persons, range from the very large to the bare subsistence; many taxpayers in the wage earner class will earn income far in excess of their self-employed counterparts. To give the **Carmichael** case the interpretation urged by appellees would open the door to justify any classification on grounds of administrative convenience. In that case the smallness of the taxpayer is apparent, but is is submitted that the **Carmichael** decision is not authority for the proposition that any classification is reasonable where it can be demonstrated that it makes collection of the tax from one class cheaper or less trouble. The caveat of the earlier cases is important; that the difference in treatment has some fair relation to the object of the tax. If the revenue would be so small from a particular class as not to justify its collection economically, then difference of treatment for purposes of administrative convenience is fairly related to the object of the tax, because sameness of treatment would undermine

the statute's purpose; but absent a reasonable basic assumption of smallness, the **Carmichael** case is not applicable. In any event, that case applies considerations of administrative convenience and expense only to explain exemption of the small class of taxpayers, not to justify the imposition of a heavier tax burden upon that class.

Appellants have suggested in their brief that administrative convenience cannot be accepted as the answer to every tax inequity; on the other hand, they have conceded that absolute mathematical equality is not necessary in taxation. In between lies the "practical equivalent" suggested in appellants' brief. Such a practical equivalent has been adopted in the federal income tax law and in the Missouri state income tax law in the form of the well-known standard deduction. This recognizes that there are many expenses necessary to the wage earner's income; it gives him in the standard deduction some rough approximation to the self-employed person's ordinary and necessary business expenses. It permits him to itemize his deductions if he chooses; for the small taxpayer's return whose auditing might be administratively and economically unsound a simple percentage deduction is allowed. No one believes that it achieves exact equality between taxpayers or that it must. It is just as available to appellees who under the guise of administrative convenience seek to justify an absolute denial of such expenses to one class of taxpayer. Furthermore, it is clear from a reading of R. S. Mo. 1949, Section 92.140 (which was the enabling act making Ordinance 46222 possible), that the General Assembly of Missouri contemplated the real possibility of some provision for deductions by employees when it enacted a section commencing "The municipal assembly of any such city may provide for deductions and exemptions from salaries, wages and commissions of employees . . ." It is because the enabling act itself does not deny wage earners as appellants the deductions granted non-wage earners, but pro-

vides the machinery for such equal treatment that appellants have confined their attack in their Specification of Errors to Ordinance 46222 and do not now claim the enabling act is violative of the Fourteenth Amendment.

B. **The Classification in Ordinance 46222 Permitting Deduction of Income Taxes to Non-Wage Earners and Disallowing Same to Wage Earners Discriminates Between Classes Which Compete With Each Other.**

In considering appellants' claim of arbitrary classification in the Ordinance qua Ordinance because of the deductibility of federal income taxes by the self-employed person, the appellees argue that there must be a prior construction to this effect by a Missouri Court to determine what constitutes a "necessary expense of operation." While appellants can readily understand their doubt as to the meaning of this terminology which the Supreme Court of Missouri termed "vexing" (R. 61), it seems that the words themselves constitute at the least an ascertainable standard which has been implemented by the Collector's Regulation 2, a true copy of which is in evidence (R. 22, 23). Whatever vagueness and indefiniteness are attributable to the phrase "necessary expenses of operation" have been removed by the Regulations; for this reason appellants have narrowed their Specification of Errors to exclude any claim of unconstitutionality because of the vague and indefinite meaning of the Ordinance (a claim which was ruled adversely to appellants by the Supreme Court of Missouri [R. 61] and which appellees paradoxically now seem willing to concede). Although appellants are not yet willing to concede that the phrase may change "from time to time as accepted methods of accounting change" (R. 61), they confess that the issue was properly ruled against them because of the clear and explicit language of the interpretative regulations supplementing the words of the Ordinance. Whatever else its fault, vagueness and in-

definiteness are not attributed to the meaning of "necessary expenses of operation" in Ordinance 46222; appellants are unaware of any statute or rule of law which would first require a judicial construction of an ordinance as a condition precedent to attacking its constitutionality on federal equal protection grounds.

Appellees, however, make no serious claim in their argument that Ordinance 46222 does not contemplate the deduction of federal and local income taxes by self-employed persons, partnerships and corporations. The Ordinance and Regulations provide that the taxpayer in the non-wage earner class shall be taxed upon the business enterprise as an entity (R. 26, 27). In this way all who report on "net profits" are treated alike and this is granted by appellees (Appellees' Brief, p. 25); viewing the partnership as an entity made liable for the earnings tax and the self-proprietor as a separate business entity similarly made liable by Ordinance 46222, appellees must also contemplate that the very earnings tax in question shall be deductible as a "necessary expense of operation" in addition to federal and local income taxes. They explain, however, the deductibility of such taxes on grounds of public policy; they urge that the Ordinance attempts to ameliorate the burden of its tax so as to lessen the competitive disadvantage of the non-wage earner taxpayer with its competitors not subject to the same burden. Appellees view competition on purely horizontal levels; since they find that self-employed persons, partnerships and corporations compete only with each other and not with wage earners (who compete only with each other on some totally different level or stratum), they see no discrimination against the wage earner taxpayer in allowing such deductions.

And it is upon this same narrow ground that appellees have distinguished the case of **Quaker City Cab Company v. Commonwealth of Pennsylvania**, 277 U. S. 389. They

argue that case is inapplicable because there is no competition here between the classes of taxpayers as defined; they approve the holding of the **Quaker City Cab** case, but insist it is applicable only as between classes who compete with each other. Their point is that wage earners do not compete with business entities, but only with each other for jobs. Such a distinction is unrealistic. Appellants submit that the competitive disadvantage is as present to the class discriminated against in the instant case as it was to the Quaker City Cab Company. Wage earners in any given line of endeavor compete with those who are offering the same services or goods as self-proprietors, partnerships, or corporations. For instance, Shapleigh Hardware in the instant case incurs certain items of expense in its truck hauling operations which are now being handled by employees as appellants. If independent contractors, partnerships or corporations are granted tax advantages which will enable them to handle Shapleigh's hauling operations on a cheaper basis than the present employee operation, it can readily be expected that Shapleigh will choose to have them do its hauling and appellants' jobs will be affected. Shapleigh will either give them the opportunity to meet the competition by taking less salary or will do away with their jobs altogether. It would then be no answer to the wage earner's dilemma to suggest that he, too, become an independent contractor, partnership, or corporation, and likewise avail himself of these tax benefits. Lack of capital may prevent the change; there are many independent factors which would imperil any attempted adjustment to a new status. Any attempted shift could work serious hardship on the wage earner. The purpose of the Ordinance is not to regulate so as to encourage wage earners in St. Louis to become entrepreneurs. Similarly, it would be no answer to the wage earner who has lost his job at Shapleigh Hardware to advise him that he may now shift to an employee status

as a truck driver with the business entity which displaced him competitively. If the demand in St. Louis for truck drivers is less than the supply, he may be one of those who finds there is no room in the occupation for him, whereas before his job was secure and it was others whose entry into the field created the excess of supply.

C. **The Discriminatory Administration of the Ordinance Against Appellants Is Supported by the Record.**

Appellees rely heavily on the opinion by the Supreme Court of Missouri to the effect that the problem of administrative enforcement was not properly before it; they contend that such a holding should foreclose this Court's review of the discriminatory operation of the Ordinance. No useful purpose could be accomplished by re-stating the reasons for appellants' position to the contrary; they have already been set out in appellants' original brief. This Court will read the pleadings and evidence and decide for itself whether the problem is fairly presented and whether this Court is bound by the adjudication of the Supreme Court of Missouri. It is significant, however, that appellees nowhere deny that the copy of the Regulations in the record is a true and accurate one (R. 21-31). They do not claim that the Regulations have ever been revoked or amended, yet they accuse appellants of a serious inaccuracy in stating that it is under this Ordinance and Regulations that appellees claim the funds withheld by Shapleigh Hardware from the wages of appellants. They assert that the funds are not claimed under the Regulations, but only under the city ordinance and enabling act. Of what effect and purpose the Regulations are appellees seem to disclaim all knowledge. The statement complained of is amply justified by the record. Appellee Del L. Bannister is Collector and in charge of the collection of the tax levied in Ordinance 46222 (R. 16). He was empowered to issue certain Regulations pertaining to the col-

lection and enforcement of said tax (R. 16, 39). Shapleigh Hardware Company has withheld certain amounts from the wages of appellants as their employer (R. 16). Employers are required to withhold their employees' tax (R. 38). A return is required to be filed with the Collector by every employer withholding (R. 38); this return is subject to the rules and regulations prescribed by the Collector (R. 38). The Collector has in fact issued such Regulations (R. 21-31).

Conclusion.

For the foregoing reasons appellants submit that Ordinance 46222 of the City of St. Louis violates the equal protection clause of the Fourteenth Amendment.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

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THE CITY OF ST. LOUIS, JOSEPH M. DARST, Mayor,
and DEL L. BANNISTER, Collector,
Appellees.

BRIEF FOR APPELLEES.

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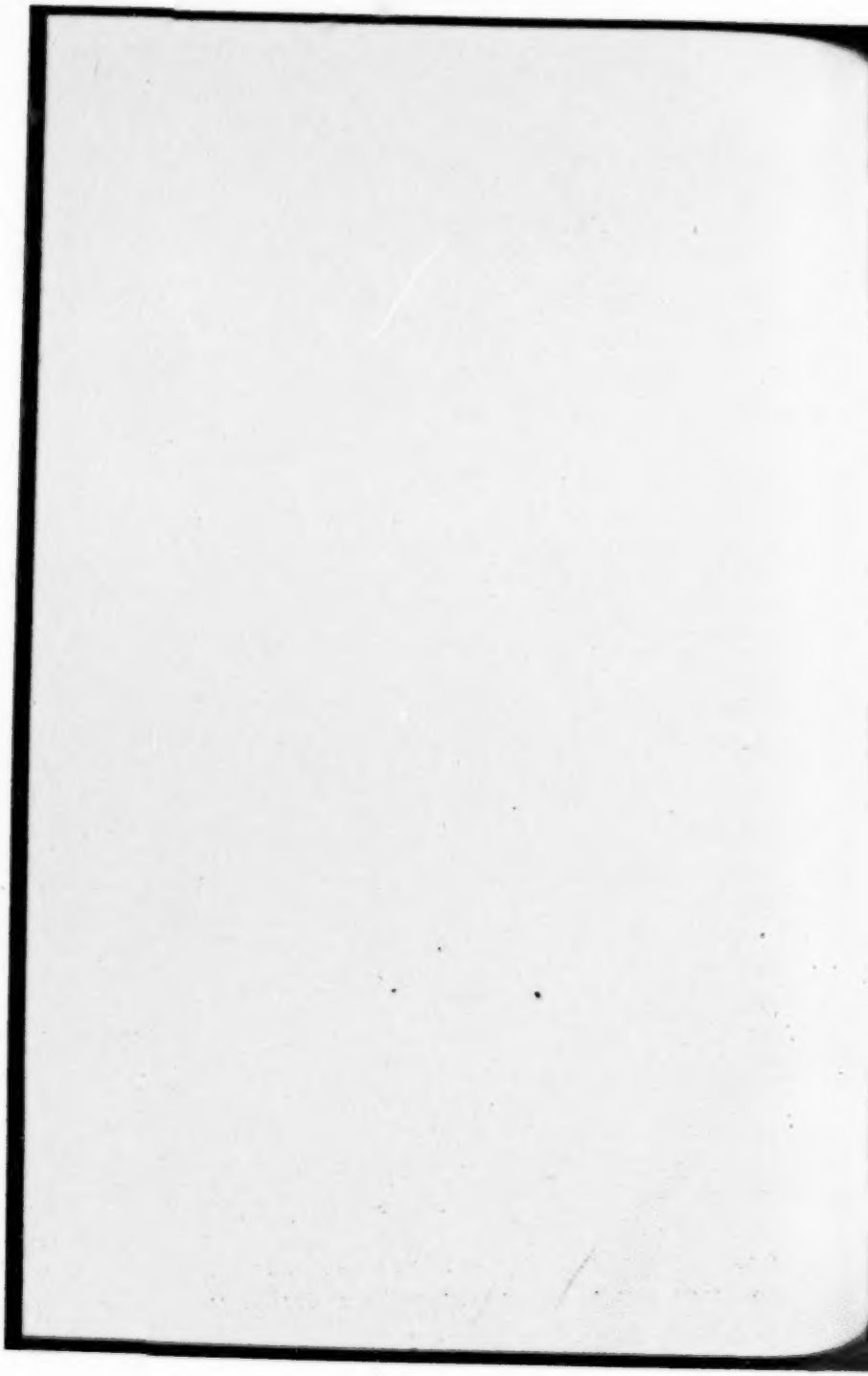

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BRIEF FOR APPELLEES.

(Emphasis ours except where otherwise noted.)

STATEMENT.

In the light of appellants' statements that the "federal questions to be reviewed were raised in the Court of first instance in plaintiffs-appellants' first pleading" and "that these questions were preserved for appellate review in the state court in appellants' motion for a new trial" (Appellants' Brief 2), and in view of the position of the appellees that Items 2 and 3 of the alleged "Questions Presented" (Appellants' Brief 5) covered later in Specifications of

Error 2 and 3 (Appellants' Brief 8) are not before this Court for review, we deem it necessary to point out what we regard to be inaccuracies in and omissions from the Statement of appellants as it relates to the subject matter of Specifications of Error 2 and 3.

Specification of Error 2 asserts that the Supreme Court of Missouri erred in holding and concluding that an ordinance was not void and constitutionally violative of the equal protection requirements of the Fourteenth Amendment "because an administrative officer promulgated a discriminatory regulation and sought to enforce said ordinance under said discriminatory regulation" (Appellants' Brief 8).

Specification of Error 3 asserts that the Supreme Court of Missouri erred in holding and concluding that "despite evidence in the record of the discriminatory administration of the ordinance against appellants" the denial of the equal protection of the laws under the Fourteenth Amendment was not properly before it (Appellants' Brief 8).

Appellants' claim that the federal questions to be reviewed were raised in their pleading and were preserved in their motion for a new trial necessitates a careful examination of the record.

An examination of the Amended Petition (R. 1-9) discloses that the only reference to rules and regulations contained therein is found in Paragraph 5 thereof and consists of an allegation that the ordinance in question "attempts to empower the defendant Collector of the City of St. Louis to promulgate necessary rules and regulations for the administration of the tax" (R. 3).

There is **no** allegation that rules and regulations were adopted; there is **no** allegation as to the content of any rule or regulation and there is **no** allegation that any rule

or regulation has the effect of rendering the state law or the city ordinance invalid and discriminatory.

We next examine the Amended Petition for the purpose of ascertaining the extent and scope of its allegations as to the violation of the rights of the appellants under the Federal Constitution.

The first reference to any such alleged violation is found in Paragraph 11 of the Amended Petition, wherein it is alleged:

> "That said **ordinance** hereinabove referred to, and said **enabling act, House Bill No. 50,** violated each and all of the foregoing provisions of the Constitution of Missouri and the equal protection of the laws requirements of the Fourteenth Amendment of the Constitution of the United States then in full force and effect and binding upon each of the defendants herein for the reason that said **ordinance** and **House Bill No. 50** seek to levy and collect taxes not uniform upon the same class of subjects and not within the territorial limits of said City of St. Louis, and further that said **Ordinance** and **House Bill** are arbitrary and discriminatory against wage earners as a class and particularly these plaintiffs" (R. 6).

The next reference to the alleged invasion of the rights of the appellants under the Federal Constitution occurs in Paragraph 15, wherein it is alleged:

> "and that said **ordinance** and said **Act, known as House Bill 50,** are arbitrary, unreasonable, discriminatory, vague and uncertain, and in violation of said Article I, Section 10, of said Constitution of Missouri and in violation of the due process and equal protection of the laws requirements of the Fourteenth Amendment of the Constitution of the United States" (R. 8).

There are **no** references in the Amended Petition to a claim of violation of the rights of appellants under the Federal Constitution other than the two heretofore set out and in neither of them is any claim made that the promulgation, the application or the enforcement of any rule or regulation has or will have the effect of violating any rights vouchsafed the appellants by the Constitution of the United States.

There is **no** allegation that the state law or the city ordinance will be enforced or systematically applied under and pursuant to any rule or regulation which has or will have the claimed effect of rendering the law or the ordinance violative of any rights possessed by the appellants under the Federal Constitution.

We next consider the allegations of the Amended Petition with a view to ascertaining the nature of the acts or threatened acts on the part of the defendants-appellees which the plaintiffs-appellants relied upon as the basis of their right to relief.

In Paragraph 1 of the Amended Petition it is alleged that the employer of the appellants has withheld and threatened to withhold the tax due on their wages "by reason of the enactment of an alleged **ordinance**" (R. 2).

In Paragraph 6 it is alleged that "it is claimed by all of the defendants herein named that said **Ordinance** is in full force and effect and will be enforced" (R. 4).

In Paragraph 7 it is alleged that defendant Collector has threatened to take into his possession such funds as may be collected by the employer and withheld by him (R. 4).

In Paragraph 16 it is alleged that "the said municipal corporation, through its agents and employees, has caused and intends in the future to cause said **ordinance** to be put into force and effect" and that unless restrained by the Court "from attempting to carry into effect said **ordi-**

nance" wages will be withheld; and that the damage "resulting by the attempted enforcement of such illegal **ordinance** is and will be incapable of ascertainment" in a court of law (R. 8, 9).

In Paragraph 17 it is alleged that plaintiffs-appellants have no adequate remedy at law unless the Court "shall issue its declaratory judgment and decree declaring said **ordinance** so adopted by the Board of Aldermen of the defendant City of St. Louis on or about the 27th day of August, 1952, as illegal and void" (R. 9).

In the prayer of their Amended Petition the relief sought is as follows:

> (a) That the court decree that "**said ordinance**" be declared illegal and void and of no force and effect.
>
> (b) That the court decree that "**House Bill Number 50**" be declared illegal and void and of no force and effect.
>
> (c) That the court restrain the defendants "from carrying or attempting to carry said **Ordinance** into effect" (R. 9).

There is no **prayer** requesting the court to declare any rule or regulation to be void, arbitrary or discriminatory; and there is no prayer that the court declare that the ordinance as systematically applied and enforced under and pursuant to any rule or regulation be declared void.

The only exhibit referred to in the Amended Petition is a copy of the **ordinance** which is attached as Exhibit A (R. 3, 4).

We next consider the judgment and decree entered in the trial court.

In Paragraph 2 of the decree the trial court adjudged that the state act and the city ordinance did not violate

the equal protection of the laws requirements of the Fourteenth Amendment to the Constitution of the United States and that said state law and city ordinance were not arbitrary and discriminatory against wage-earners as a class or the plaintiffs herein (R. 42).

In Paragraph 5 the court decreed that plaintiffs had failed to establish the allegation of their petition, that the ordinance and the state law were arbitrary, unreasonable, discriminatory, vague and uncertain and in violation of the due process and equal protection of the laws requirements of the Fourteenth Amendment (R. 43).

The decree and judgment of the trial court did **not** undertake to make any finding or ruling as to the existence of any rule or regulation, as to the validity of any such rule or regulation, as to the effect of any such rule or regulation and did not contain any finding or adjudication that said ordinance was being systematically applied and enforced under and pursuant to any rule or regulation.

We next proceed to a consideration of the motion for new trial filed by the plaintiffs-appellants with a view to ascertaining the questions preserved by them for review in the appellate court in said motion insofar as they relate to the subject matter of this appeal.

In Paragraph 2 of the motion for new trial it was alleged that the Court erred in finding and holding "**That the said act and the ordinance of the City of St. Louis**" did not and do not violate the due process and equal protection of the laws requirements of the Fourteenth Amendment (R. 44).

In subdivision (d) of Paragraph 5 of the motion for new trial it was alleged that the Court erred in finding and holding that "**plaintiffs have failed to establish the allegations of their petition,** that said **ordinance** and said **act**

known as House Bill Number 50 are arbitrary, unreasonable, discriminatory, vague and uncertain, and in violation of said Article I, Section 10, of said Constitution of Missouri and in violation of the due process and equal protection of the laws requirements of the Fourteenth Amendment of the Constitution of the United States" (R. 45).

There was **no** claim in the motion for new trial that the trial court erred in failing and refusing to pass upon the validity of any rule or regulation, or to take into consideration the effect upon the ordinance of any rule or regulation, or to rule as to the effect of any claimed systematic enforcement or application of the ordinance pursuant to any rule or regulation, or otherwise.

The **only** error complained of in the motion for new trial in connection with the claimed violation of the rights of the appellants under the Federal Constitution consisted of the alleged error in finding and holding that the **state law** per se and the **city ordinance** per se did not violate the Constitution of the United States and in ruling that the plaintiffs had failed to establish the allegations of their petition that the **ordinance** per se and the state law per se were in violation of the due process and equal protection requirements of the Federal Constitution.

The Supreme Court of Missouri, when the case reached it on appeal, held that the appellants had not raised in their pleading the questions of unconstitutionality arising out of any administrative or enforcemental rule and that this issue was not in the case.

In this connection the Supreme Court of Missouri said:

> "Furthermore, this action does not seek to have the ordinance declared unconstitutional because of any administrative or enforcemental rule adopted. A careful reading of the petition fails to disclose any men-

tion of the rules other than that the ordinance 'attempts to empower the defendant collector * * * to promulgate necessary rules and regulations for the administration of the tax, and authorizing every employer collecting or remitting the tax to deduct and retain therefrom three per cent of the total (fol. 45) amount withheld * * *.' Nowhere in the charging part or in the prayer of the petition is any complaint leveled against or relief sought on account of the rules. But appellants say the case was tried upon that theory and cite as authority for their assertion the agreed statement of facts, wherein a recital is made as to the adoption of the ordinance and promulgation of rules, and that a 'copy of said ordinance and said pamphlet is hereto attached, * * * incorporated herein by reference, pursuant to which ordinance and enabling act defendant Del L. Bannister (collector) claims the funds withheld from the wages of plaintiffs by defendant Shapleigh Hardware Co.'

"We are clearly of the opinion that such a recital in the agreed statement of facts cannot inject into the case an issue that is wholly foreign to the whole theory upon which the action is predicated and pleaded" (R. 57-58).

For the reasons above stated the Supreme Court of Missouri refused to make any adjudication as to the validity or effect of the rules and regulations.

A serious inaccuracy in appellants' statement appears in the following sentence on page 6 of their brief, wherein it is said:

"It is under this Ordinance, enacted on August 27, 1952, **and Regulations promulgated by appellee Bannister,** that the appellees make claims to certain funds withheld by Shapleigh Hardware from the wages of appellants (R. 16, 17)."

The record citation does not support the statement that appellees made claim to the funds **under the Regulations** promulgated by appellee Bannister.

This is what the record does show:

> "On August 27, 1952, the Board of Aldermen enacted into law Ordinance 46222, a so-called earnings tax ordinance, and on August 28, 1952, defendant Del L. Bannister did issue on behalf of defendant City of St. Louis, pursuant to Section Nine of said ordinance, in **pamphlet** form, certain information, instructions and regulations as a guide to taxpayers. A copy of said **ordinance** and said **pamphlet** is hereto attached, marked Plaintiffs' Exhibit 'A,' and is incorporated herein by reference pursuant to which **ordinance** and **enabling act** defendant Del L. Bannister claims the funds withheld from the wages of plaintiffs by defendant Shapleigh Hardware Co."
>
> Paragraph 3, Agreed Statement of Facts (R. 16, 17).

It thus appears that the funds were **not** claimed under the **Regulations**, but that they were claimed **only** under the **city ordinance and the state enabling act.**

SUMMARY OF ARGUMENT.

A. In taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Madden v. Commonwealth of Kentucky, 309 U. S. 83, 60 S. Ct. 406, 84 L. Ed. 590. One assailing the validity of the classification assumes the burden of demonstrating that the classification results in a wholly arbitrary, unwarranted and oppressive discrimination. Classification will be upheld if any state of facts reasonably can be conceived to sustain it. State Board of Tax Commissioners v. Jackson, 283 U. S. 527, 51 S. Ct. 540, 75 L. Ed. 1248.

There is a complete failure of the proof required to demonstrate that classification between the gross receipts earned as wages and the net profits derived from the conduct of a busines is without any conceivable reasonable basis; on the contrary, the distinction is based upon grounds that are patent and obvious.

Gross receipts derived from wages normally approximate the net gain derived from the services rendered, whereas gross receipts derived from the conduct of a business do not remotely approximate the net gain.

Generally speaking, gross wages of employes and the net profits of a business are as near to reaching the "take-home" pay as could be reasonably devised. City of Louisville v. Sebree, 308 Ky. 420, 214 S. W. 2d 248.

The fact that in comparatively rare and isolated cases one who earns a wage or salary may incur an expense in connection with the services he performs does not render the classification invalid. The maintenance of a precise scientific uniformity is not required. Lawrence v. State Tax Commission, 286 U. S. 276, 52 S. Ct. 556, 76 L. Ed. 1102.

Administrative convenience and expense in themselves justify a difference in treatment. Carmichael v. Southern Coal & Coke Co., 301 U. S. 495, 57 S. Ct. 868, 81 L. Ed. 1245.

In the case of taxes due on wages earned, withholding is the only effective device for collecting the tax. If deductions are allowed from wages, withholding would be impractical, cumbersome and expensive.

Quaker City Cab Co. v. Commonwealth of Pennsylvania, 277 U. S. 389, is not applicable. There the tax was imposed upon the gross receipts derived by corporations engaged in the public carrier business while individuals and partnerships engaged in the same business and competing with the corporations were not subject to the tax. Wage earners do not compete with employers. Here all wage earners are treated alike and all employers are treated alike.

The nature and form under which one exercises the right to earn income may result in a difference of tax burden. In the Quaker City Cab case it was recognized that a difference in the source of receipts might constitute the basis of a valid classification.

B. The alleged discriminatory administration of the ordinance is not subject to consideration in this appeal because the issue was not raised by the appellants in the state court or adjudicated by the state court.

The Supreme Court of Missouri held that this action "does not seek to have the ordinance declared unconstitutional because of any administrative or enforcemental rule adopted" (R. 57).

The Supreme Court of Missouri found that the issue was not raised by the petition of the appellants (R. 57), and that a recital in the agreed statement of facts, that the Collector had promulgated rules, a copy of which was in-

corporated in the agreed statement of facts, could not inject into the case an issue that was wholly foreign to the whole theory upon which the action was predicated and pleaded (R. 58).

Since the action was brought under the declaratory judgment statute of the State of Missouri, the decision of the Supreme Court as to the scope of the issues embraced in the pleadings was a matter of local law.

If this Court reviews the action of the Missouri Court involving a matter of local law, it will do so only to make certain that the non-federal ground of decision is not so colorable or unsubstantial as to be in effect an evasion of the constitutional issue. Memphis Natural Gas Co. v. Beeler, 315 U. S. 649, 654, 86 L. Ed. 1090. Appellants do not contend, nor have they any authority to demonstrate, that the decision of the Missouri Court construing the pleadings was based on colorable and unsubstantial grounds.

Where a statute is attacked as being repugnant to the Federal Constitution by reason of the method in which the statute was applied, the claim must be made in explicit terms. Charleston Federal Savings & Loan Assn. v. Alderson, 324 U. S. 182, 185, 89 L. Ed. 857. An independent review of the pleadings must lead the Court to the same conclusion as that reached by the Supreme Court of Missouri.

C. Since the Constitution of Missouri, Article V, Section 22, Constitution of 1945, and the statutory laws of Missouri, Chapter 536, Revised Statutes 1949, provide for a direct judicial review of the rules promulgated by an administrative officer, and further provide that such review shall include a determination as to whether any particular rule is authorized by law, this Court should refrain from passing on any constitutional issue involving the validity and effect of the administrative rules promulgated by the Collector until the Missouri Court has ruled as to their

validity and effect. Spector Motor Service v. McLaughlin, 323 U. S. 101, 105, 89 L. Ed. 101.

The power of the City of St. Louis to impose a tax stems from the authority granted by the state enabling act. The ordinance could not transcend the bounds set by the state law; nor could the regulation. Since the state law limits deductions from gross earnings to necessary expenses of operation only, any regulation which permitted deductions that did not constitute necessary expenses of operation would be invalid under the Constitution of Missouri, because not authorized by law. Article V, Sec. 22, Constitution of Missouri, 1945.

Since the Missouri Supreme Court has held that the issue as to the validity and effect of the regulation was not embraced in the pleadings, the appellants are not foreclosed from obtaining a judicial adjudication in a subsequent appropriate proceeding, and this Court should not undertake to determine the constitutional effect of the regulation until the Missouri Court has had an opportunity to interpret the regulation.

D. If federal income taxes and charitable contributions constitute necessary expenses of operation under the Missouri law, the allowance thereof as deductions does not render the state law or city ordinance invalid.

The claim in this case is that the discrimination violative of the Fourteenth Amendment arises out of the fact that wage earners are not entitled to deduct business expense, while those engaged in conducting business activities are permitted to deduct from gross receipts necessary expenses of operation. If the deduction of necessary expenses of operation does not make the statute violate the Fourteenth Amendment, the fact that federal income taxes and charitable contributions are regarded as necessary

expenses of operation would not render the statute and the ordinance obnoxious to the Federal Constitution.

Discrimination, if any, exists against the wage earner who is compelled to pay a higher tax by reason of the disallowance of items expended for working clothes, transportation, depreciation on tools, etc. (assuming that they are business expenses), to the same extent as if the discrimination arose from a failure to allow federal income tax payments and charitable contributions. If the discrimination in the one instance is not invalid, it cannot be invalid in the case of the other.

The allowance of federal income tax payments as deductions in the case of persons conducting a business is justifiable by reason of the fact that persons so engaged and subject to the tax are faced with the competition of others not subject to the tax. This is not true in the case of the wage earner.

E. Before one may claim that his constitutional right to the equal protection of the laws under the Federal Constitution has been invaded as the result of a discriminatory law, he must show not only that the discrimination exists, but that it has, or will, subject him to damage or injury. Constitutional questions may not be raised and adjudicated on behalf of a class as a whole. The party plaintiffs must allege and prove that the discrimination results in pecuniary loss or damage to them. Roberts & Co. v. Emmerson, 271 U. S. 50, 54, 70 L. Ed. 827.

Although the plaintiffs pleaded that the statute was discriminatory particularly as to them, no proof was offered in support of the allegation. The record does not disclose that plaintiffs had or would incur any business expense; any income tax liabilities; or that plaintiffs had or would make charitable contributions.

ARGUMENT.

A.

The Legislative Classification Embodied in the State Law (House Bill No. 50) and Carried Out in the Earnings Tax Ordinance (Ordinance 46222) Imposing a Tax Upon Salaries, Wages, Commissions and Other Compensation on the One Hand, and Upon Net Profits of Corporations and of Associations, Businesses or Other Activities on the Other, Does NOT Violate the Fourteenth Amendment.

Appellants concede that the legislative power to classify for tax purposes is of "wide range and flexibility" and that "there is a presumption of constitutionality favoring the taxing statute which can be overcome only by an explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes" (Appellants' Brief p. 14).

This Court has gone further and has stated that classification of a taxing statute will be upheld "if any state of facts reasonably can be conceived to sustain it."

State Board of Tax Commissioners v. Jackson, 283 U. S. 527, 538, 51 S. Ct. 540, 75 L. Ed. 1248.

We realize that the nature of the issues presented does not warrant any extended discussion as to the precarious financial condition in which most large cities have been placed as a result of increased costs of operation coupled with demands for more extensive service.

This is particularly true of the City of St. Louis which, by reason of its unique and anomalous dual status under the Constitution of Missouri as a city and as a county (R. 20), is unable to extend its corporate limits, and is required to provide the funds for salaries and expendi-

tures of state officers performing county functions within its corporate limits, although the city has no control over the salaries and expenditures of these officers.

Conventional sources of revenue such as ad valorem property taxes and license taxes have proved inadequate to meet the needs, and out of the search for relief there has evolved the "earnings tax" (R. 20).

Some idea of the importance of the tax to the City of St. Louis may be gleaned from paragraph 12 of the Agreed Statement of Facts (R. 20, 21).

The petition of the appellants attacks the validity of the state law which enables the City of St. Louis to impose the tax, described as House Bill 50, and of the ordinance enacted pursuant to the authority granted by the state law, Ordinance 46222.

The state law authorizes the imposition of a tax on wages, salaries, commissions and other compensation received by residents of the city, on wages, salaries, commissions and other compensation received by non-residents for services rendered in the city, on the net profits of associations, businesses or other activities conducted by residents, on net profits of associations, business or other activities conducted in the city by non-residents, and on the net profits of corporations as a result of work done or services performed and business and other activities conducted in the city (Appendix to Appellants' Brief, 27-30).

The statute provides that the net profits or earnings of associations, business or other activities, and corporations shall be ascertained and determined by deducting the **necessary expenses of operation** from the gross profits or earnings (Appendix to Appellants' Brief, 28).

In State Board of Tax Commissioners v. Jackson, 283 U. S. 527, 537, 51 S. Ct. 540, 75 L. Ed. 1248, this Court, speaking through Mr. Justice Roberts, said:

"The principles which govern the decision of this cause are well settled. The power of taxation is fundamental to the very existence of the government of the states. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations. Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 S. Ct. 533; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 S. Ct. 496; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 54 L. ed. 883, 30 S. Ct. 578.

"The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 S. Ct. 43, or if any state of facts reasonably can be conceived to sustain it. Rast v. Van Deman & L. Co., 240 U. S. 342, 60 L. ed. 679, L. R. A. 1917A, 421, 36 S. Ct. 370, Ann. Cas. 1917B, 455; Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. ed. 350, 32 S. Ct. 192."

Appellants' first claim of discrimination violative of the Fourteenth Amendment is based upon the fact that one engaged in conducting a business or profession is permitted to deduct from his gross receipts the necessary expenses of operation whereas one whose compensation is derived from wages, salaries and commissions who may incur a necessary expense in connection therewith is not allowed to deduct the same.

It should be pointed out that the record is devoid of any proof as to the nature or quantum of the expense to which wage earners and salaried employes are necessarily subjected in connection with their employment and that no

such proof was offered as to the particular plaintiffs in the suit.

In the absence of such proof we must rely on the knowledge acquired through general experience and observation.

While there may be instances where the wage earner and salaried employe do incur expense directly connected with their employment, it is generally and normally true that the gross receipts derived from wages and salaries approximate the net gain realized by the employe.

It is difficult to believe that where expense is incurred the amount is substantial, for if such expense should become substantial it would be compensated for by a higher wage.

On the other hand the fact that gross receipts derived from the conduct of a business in no way represent the net gain derived by the owner of the business is patent and obvious.

One conducting a business ordinarily is required to acquire real estate or pay rent, to pay his employes, to purchase supplies, to maintain inventories, and so on ad infinitum.

In the City of St. Louis merchants and manufacturers are required to pay licenses based on sales as well as ad valorem taxes on inventories.

The necessary expenses of operation usually absorb a substantial part of the gross receipts.

These considerations lead the Supreme Court of Kentucky, in upholding an ordinance of the City of Louisville which levied a tax on wages, salaries and compensation, without deductions, and on "net profits" of business to say:

> "Probably the 'net profits' of the business of employers or a personal profession and the gross wages

or salaries of employees is (sic) as near to reaching the 'take home' pay as could be reasonably devised. The federal constitution does not demand absolute equality."

City of Louisville v. Sebree, 308 Ky. 420, 214 S. W. 2d 248, 256.

There is too a substantial difference between the classes, arising out of the fact that one who conducts a business is required to subject his capital to the varying fortunes that affect the economic life of the community.

The Supreme Court of Pennsylvania upheld an ordinance of the City of Philadelphia which made the same classification as is present in the Missouri statute and in the St. Louis ordinance, and in so doing said:

"Furthermore, salaries and wages are in their nature essentially certain, and free from the speculative features inevitably attached to net profits. A business or professional man at the end of a year of industrious work may find that his efforts have produced no net income,—only a loss. In another year his net profit may be tremendous. The salaried man or wage earner proceeds on a more even keel. He usually knows in advance of performance just how much his salary or wage will be. Also, he knows currently what he is earning, while the business or professional man generally calculates his net profit or loss on an annual basis. He has to operate and calculate on a long range basis. Many of our laws for the benefit of employees are based upon these, and other fundamental and universally recognized, differences between the earning position of an employee and that of a business or professional man depending, not on salary, but on net profits for his livelihood."

Dole v. City of Philadelphia, 337 Pa. 375, 11 A. (2d) 163, 166.

It is true that absolute equality might be achieved if wage earners and salaried employes were permitted to deduct necessary business expenses incurred.

There were and are, however, practical aspects in respect to the administration and collection of the tax which militate against such allowances and the legislative body may take these into consideration.

All wage earners and salaried employes who earn their livelihood in St. Louis are subject to the tax.

While the record does not show the number of such employes, some idea may be gained from the fact that the City has a population in excess of 800,000, and that a very large number of people who live in the suburban areas adjoining St. Louis and in East St. Louis across the river are employed within the city.

The only practical and convenient method of collecting the tax from these wages earners, or at least the most practical and convenient method, is through the device of withholding by the employer. Otherwise, thousands of persons subject to the tax could evade payment.

If deductions of business expense were allowed to employes, each withholding employer would be required to keep records showing, as to each employe, the business deductions claimed, to determine whether or not such deductions were in fact permissible, and to file separate reports as to each employe.

Such a procedure would subject the employer to substantial expense. In recognition of the fact that the employer sustains expense in connection with his obligation to withhold, the ordinance (Section Seven—Appendix to Appellants Brief 38) presently permits him to retain three per cent of the total amount he collects.

If substantially greater expense were to be incurred, a larger measure of compensation would be required.

But the additional expense would not stop at this point. A proper enforcement of the ordinance, in the event that deductions were permitted to wage earners, would require the employment by the City of St. Louis of a staff of auditors and investigators adequate to make the necessary and appropriate checks as to the validity and authenticity of the claimed deductions.

It may be contended that an alternative method of allowing deductions of business expense, in the case of wage earners, would be to continue with the existing method of withholding on the gross, and of permitting any employe who claims a business expense to file a return and a claim for refund.

Such a method would, of course, likewise require the employment of a large staff of auditors and investigators to examine the returns, and entail the additional expense of making out and mailing checks for refunds.

Under the ordinance, employes whose wages are withheld are not required to file a return (Section Five—Appendix to Appellants' Brief, 37, 38).

This fact in itself may be regarded as the equivalent of a form of deduction, bearing in mind the modesty of the tax imposed.

If the total amount of business expense incurred by an employe were one hundred dollars, the difference in his tax would be fifty cents.

In Carmichael v. Southern Coal & Coke Company, 301 U. S. 495, 57 S. Ct. 868, 81 L. Ed. 1245, it was held that an Alabama law which imposed an unemployment compensation tax on employers having eight or more employes did not violate the Fourteenth Amendment because employers having less than eight employes were not subject to the tax, and, in the course of the opinion, the Court

said that "administrative convenience and expense in the collection or measurement of the tax are alone a sufficient justification for the difference between the treatment of small incomes or small taxpayers and that meted out to others" (301 U. S. 495, 511).

The considerations of administrative convenience and expense, which justify in some cases the total exemption of small taxpayers, likewise justify the denial of deductions to small taxpayers, where the efficacy of collection would be impaired and where the cost of collection would be greatly increased if deductions were allowed.

Particularly should this be true in a case where the record fails to disclose that the deductions are substantial, and where experience suggests that on the whole they are not significant.

From what has been pointed out above, it follows that there are considerations which are at variance with the claim made by appellants that "the deductions allowed the class of non-wage earners * * * can just as conveniently be granted to the employed earner" (Appellants' Brief, 17).

It is true that appellants have suggested that "some practical equivalent" of these deductions can be granted to the employed earner.

It is clear that what the appellants have in mind is the inclusion in the ordinance of exemptions that are authorized by the state law (Sec. 8, H. B. 50—Appendix to Appellants' Brief, 29).

Exemptions, of course, would have to be uniform in character. In no true sense do exemptions achieve the equality for which appellants contend. Exemptions are arbitrary in amount, with no real relation to the amount any particular taxpayer expends. Thus, an exemption of $600 granted to every taxpayer for each dependent remains

the same whether the taxpayer has expended $200 or $2000 for the support of the dependent.

The statute envisaged the possibility that circumstances might arise when it should become desirable and in the public interest that exemptions be granted.

The exercise of the authority to grant exemptions is a matter of legislative discretion. There is no claim in the petition and no proof in the record of the existence of circumstances which brand the failure of the Board of Aldermen to grant exemptions as arbitrary, harsh and oppressive.

Appellants claim that the differences which exist between the two classes have no real and substantial relation to the object of the tax, to wit, the raising of revenue, in that the subjects of the tax are the same, that is, the "exercise of the right to earn income" (Appellants' Brief, 16).

Appellants, in this connection, assert that the "legal form or character" by which the taxpayer chooses to exercise his right to earn income is immaterial as it relates to a taxing measure.

We assume that the right to earn income has no higher or different status than the right to acquire and own property. One taxpayer may exercise the right to acquire and own real estate; another to own and acquire bonds or other forms of intangible property.

Does it follow that because both have exercised the same right, the intangible property must be subjected to the same ad valorem tax as is the real property?

In the very case of the exercise of the right to earn income, it has long been recognized that the "legal form and manner" in which the right is exercised may result in differences of taxation.

If a taxpayer undertakes to exercise his legal right to earn income in the form of a corporate enterprise he finds himself subjected to taxes that are different in amount than if he chose to conduct his business as an individual.

The economic impact on the community and of the revenues it may derive are affected by the form in which the right to earn income is exercised.

The individual who chooses to start a business in a community adds economic values which provide revenues. If he constructs a factory on a vacant lot he enhances the revenues derived from ad valorem property taxes. If he starts a manufacturing business in the factory, he enhances the revenues derived from the manufacturer's tax based upon the volume of his sales, and additional ad valorem taxes based upon his inventories. His contributions to the revenues perhaps make it possible for the city to levy an earnings tax of one-half of one per cent in lieu of the one per cent permitted by law; and if his example induces others to start a business, it may become possible to reduce the earnings tax to ¼th of 1%, or to eliminate it entirely.

We have pointed out some of the differences in the two classes which led the highest courts of three states, Pennsylvania, Kentucky and Missouri, to find a reasonable basis for the differences in classification.

We have referred to other differences which readily suggest themselves.

In the Carmichael case, supra, this Court, after stating that a state legislature, in the enactment of laws, has the widest possible latitude, went on to say:

> "In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a

record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action" (301 U. S. 495, 510).

The one case upon which the appellants rely is Quaker City Cab Company v. Commonwealth of Pennsylvania, 277 U. S. 389, 72 L. Ed. 927.

In that case a gross receipts tax was imposed upon all corporations engaged in the business of public transportation. Individuals and partnerships engaged in the identical business were not subjected to the tax. A majority of the Court held that there was no substantial basis for the singling out of corporations engaged in the business. Mr. Justice Holmes, Mr. Justice Brandeis and Mr. Justice Stone dissented.

A mere statement of the case, it would seem to us, suffices to demonstrate its inapplicability to the case at bar.

There can be no question that the imposition of the tax upon corporations imposed upon them burdens which placed them at a disadvantage in competing with individuals and partnerships engaged in the identical business.

In the case at bar wage earners are not in competition with their employers. Wage earners who earn their wages in the City of St. Louis, and to that extent compete with each other for jobs, are subject to the same tax.

Individuals, partnerships, associations, corporations conducting their business in St. Louis are treated alike.

Appellants stress the fact that this Court decided the Quaker City Cab case on the ground that "the character of the owner is the sole fact on which the distinction and

the discrimination are made to depend. The tax is imposed merely because the owner is a corporation" (277 U. S. 402).

Appellants fail to give effect to the language which immediately follows that quoted above and which is as follows:

> "The discrimination is not justified by any difference in the source of receipts or in the situation or character of the property employed" (277 U. S. 402).

It is clear from the foregoing that a difference in the "source of receipts" would constitute a reasonable basis for difference in classification.

The tax at bar does involve a classification based upon a difference in the source of receipts.

The source of receipts on the one hand consists of wages paid, which normally approximate the net gain and which are payable regularly, and without regard to the hazards of a business; on the other hand, the source of receipts consists of gross intake, involving risk, investment, employment of property, contractual obligations, subject to diminution by the necessary expenses incurred, sometimes resulting in large net gain, sometimes in small net gain, and sometimes in loss.

Appellants have failed to meet the burden which they recognize as theirs to demonstrate explicitly that there is no conceivable rational basis for the classification.

The classification embodied in the state law and incorporated in the city ordinance is reasonable because it is a classification "which an informed, intelligent, just-minded, civilized man could rationally favor" (Mr. Justice Brandeis, dissenting, Quaker City Cab Company v. Commonwealth of Pennsylvania, 277 U. S. 389, 406).

B.

The Validity and Effect of the Regulations and the Claimed Discriminatory Administration of the Ordinance Based Upon Appellants' Interpretation of the Regulations Are Not Subject to Consideration Upon This Appeal Because the Issue Was Not Raised by the Appellants and Was Not Adjudicated in the State Court.

In our statement we have analyzed in detail the allegations of the amended petition for the purpose of demonstrating that appellants did not raise or preserve, as they claim, any alleged federal question growing out of any rule or regulation promulgated, enforced or applied by the Collector, or growing out of any discriminatory administration or enforcement of the ordinance.

It would seem to us that one seeking the protection of the Federal Constitution against what is asserted to be hostile, arbitrary and oppressive discrimination should be required to set out his claim in language that is clear and wholly devoid of ambiguity.

The ordinance under attack was approved on August 28, 1952 (Appendix to Appellants' Brief 41).

The suit was filed on September 12, 1952 (Appellants' Brief 7).

The record does not disclose the date on which the amended petition was filed.

As we have pointed out in our statement the only reference to "rules and regulations" contained in the amended petition is found in paragraph 5 wherein it is alleged that the ordinance "attempts to empower the defendant Collector of the City of St. Louis to promulgate necessary rules and regulations for the administration of the tax" (R. 3).

We have further pointed out that nowhere in the amended petition is the alleged violation of Federal rights of appellants **predicated** upon the existence of rules and regulations, the interpretation of rules and regulations, nor the application, enforcement or administration of the ordinance pursuant to any rule or regulation, or otherwise.

The challenge that was made and the **only** challenge that was made in the pleading was a challenge directed at the state law based and **solely** based upon the provisions contained in the state law, and at the ordinance enacted pursuant to that law, based and **solely** based upon its provisions.

It is true that the Agreed Statement of Facts did recite that regulations had been promulgated and that a copy thereof was attached to and incorporated therein by reference (R. 16).

It is interesting and important however to note that in paragraph 4 of the Agreed Statement of Facts there appears the following:

"All constitutional provisions, state or Federal, legislative enactments, ordinances or city charters are stipulated **to have been well pleaded**, although no admissions are made as to their applicability and effect, and are hereby incorporated into this stipulation as though fully set out" (R. 17).

There is no stipulation that the "rules and regulations" referred to in the preceding paragraph of the Agreed Statement had been "well pleaded" and the omission of such a stipulation is significant.

The action below was instituted under and pursuant to the Declaratory Judgment law of the State of Missouri.

The construction of the pleadings for the purpose of determining the scope of the issues was a question of Missouri law.

The determination as whether the scope of the issues had been broadened or enlarged by matters set out in the Agreed Statement of Facts was a question of Missouri law.

Brown v. Western Railway of Alabama, 338 U. S. 294, 94 L. ed. 100, cited by appellants in support of their claim that this Court need not accept as final a state court's construction and interpretation of allegations in a complaint asserting a federal right involved an action instituted in Georgia under the Federal Employers' Liability Act.

The suit in the case at bar was brought under the Missouri declaratory judgment act and involved a number of questions of purely local law. See paragraphs 8 (R. 4), 9 (R. 5), 10 (R. 5, 6), 12 (R. 6), 13 (R. 7) and 14 (R. 7) of the Amended Petition.

It is true that this Court "in the performance of its duty to safeguard an asserted constitutional right may inquire whether the decision of the state court rests upon a fair and substantial basis." Memphis Natural Gas Co. v. Beeler, 315 U. S. 649, 654, 86 L. ed. 1090.

But its examination is "only to make certain that the non-federal ground of decision is not so colorable or unsubstantial as to be in effect an evasion of the constitutional issue." Memphis Natural Gas Co. v. Beeler, supra.

Appellants do not contend nor have they cited any authority to demonstrate that the construction given to their petition by the Supreme Court of Missouri was so colorable or unsubstantial as to constitute in effect an evasion of the constitutional issue.

All that they say in this regard is: "The **Ordinance's** denial of equal protection was alleged in the pleadings

under which the case was determined" (Appellants' Brief, 12). They do not claim, nor can they claim, that their pleading alleged that the ordinance as applied and as enforced under and pursuant to the regulations violated their constitutional rights.

Appellants do not cite any authority under the Missouri law or any decision of this Court which demonstrate that the failure to enlarge the scope of the **pleaded** issues as a result of evidence incorporated in an Agreed Statement of Facts was capricious or merely colorable or for the purposes of evasion.

This Court has held:

> "It is essential to our jurisdiction on appeal under [237 (a)] that there be an **explicit** and timely insistence in the state courts that a state statute, **as applied,** is repugnant to the Federal Constitution, treaties or laws."
>
> Charleston Federal Savings and Loan Association v. Alderson, 324 U. S. 182, 185, 89 L. ed. 857.

The Supreme Court of Missouri found that there was no explicit claim in the petition that the statute or ordinance as applied under the regulations violated the rights of the appellants under the Fourteenth Amendment.

An analysis of the petition fully supports this conclusion; and more it discloses that the petition does not even afford the basis of any implied claim that the constitutional protection was invoked by reason of the existence and application of any rule or regulation.

The Supreme Court of Missouri declined to interpret the rules, or their effect upon the state law and the ordinance upon the ground that the issue had not been raised by the appellants.

Therefore the only matters embraced and concluded by the judgment here under review are the validity of the

state enabling act as written and the validity of the ordinance as written.

Nothing in the judgment forecloses any taxpayer on a proper showing from challenging in the future the validity of any rule or regulation and the constitutionality of the ordinance as applied and enforced under a rule which is valid in Missouri.

The Supreme Court did intimate that in Missouri a rule which has the effect of making invalid a statute or ordinance otherwise valid would be void (R. 58).

It thus appears that the Missouri courts will not sanction rules and regulations of administrative officers which transcend the bounds of the statute.

Only in the event that a particular rule had been interpreted and declared valid would it become part of the statute. Then and then only could this court determine whether the statute or the ordinance as interpreted by the Missouri court did or did not violate the Fourteenth Amendment.

Since the Constitution and the laws of Missouri, as we shall point out in the next section of our brief, provide for a direct judicial review of the rules and regulations of the Collector, this court should not in advance of a ruling by the Missouri Court speculate as to the Missouri law on the subject.

C.

Where, Under the Law of the State, an Administrative Ruling Not Authorized by Law Is Invalid, and Where the Clear and Unequivocal Right to a Direct Judicial Review of Such Ruling Is Guaranteed by the Constitution of the State and Implemented by the Statutory Laws of the State, This Court Should Refrain From Ruling on the Constitutionality of the State Law Where Lack of Constitutionality Is Predicated Upon the Administrative Rule, Until the State Court in an Appropriate Proceeding Under an Appropriate Pleading Has Determined the Validity, Meaning and Effect of the Administrative Rule.

This court does not lack familiarity with the reaction of the public and the bar to the practices of administrative agencies and officers during the decade or two past which have led to and resulted in substantial curtailments of the powers previously exercised by such administrative agencies and officers, including the power to promulgate and adopt rules affecting the rights of the citizen.

So important was it to the people of the State of Missouri that administrative agencies and officers be limited to the exercise of powers conferred upon them by law that they provided in adopting their new Constitution in 1945 as follows:

> "All final decisions, findings, **rules**, and orders of any administrative officer or body existing under the constitution or by law, which are judicial, or quasi judicial and affect private rights, shall be **subject to direct review by the courts** as provided by law; and such review shall include the determination whether the same are **authorized by law**, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon

the whole record." Article V, Sec. 22, Constitution of Missouri, 1945.

The appellee Bannister, Collector of Revenue of the City of St. Louis, who promulgated the regulations in question, occupies an office created by state law, Sections 52.010 and 52.020, Missouri Revised Statutes 1949 (Appendix), and his administrative decisions, and the rules and regulations which he promulgates are within the scope of the provisions of the Constitution of Missouri above quoted.

The constitutional provision has been implemented by the administrative procedure act of Missouri. Chapter 536, Missouri Revised Statutes 1949.

The Collector of Revenue of the City of St. Louis as a state officer is subject to the provisions of that act.

Section 536.040, Missouri Revised Statutes 1949, provides:

> "Any person may petition an agency requesting the promulgation, amendment or repeal of any rule" (536.040, R. S. Mo. 1949).

Section 536.050, Mo. Rev. Statutes 1949, provides:

> "The power of the courts of this state to render declaratory judgments shall extend to declaratory judgments **respecting the validity of rules, or of threatened applications thereof,** and such suits may be maintained whether or not the plaintiff has first requested the agency to pass upon the question presented."

The said section further provides:

> "Nothing herein contained shall be construed as a limitation on the declaratory or other relief which the courts might grant in the absence of this section."

The ordinance in question was enacted by the City of St. Louis under and pursuant to the state enabling act. The

Supreme Court of Missouri had previously ruled in Carter Carburetor Corporation v. City of St. Louis, 356 Mo. 646, 203 S. W. 2d 438, that the City of St. Louis did not have the power to levy the tax under its charter.

It is clear that the authority conferred upon the City of St. Louis was limited to the terms of the enabling act.

The enabling act specifically prescribed that the "net profits" of associations, businesses or other activities and corporations "shall be ascertained and determined by deducting the **necessary expense of operation** from the gross profits or earnings" (Appellants' Brief 28).

The appellants somewhat blandly assert that the regulations promulgated by the collector authorize the deduction of Federal income taxes, interest on indebtedness and charitable contributions, whether the same be incurred or paid out in connection with the business carried on or personally.

Article V, Sec. 22, of the Missouri Constitution quoted above not only provides for direct judicial review of rules promulgated by the administrative officer, but specifically provides that the judicial determination shall extend to a determination of the question as to whether the rule is **authorized by** law.

Since the law authorizes only the deduction of **necessary expense of operation**, and since the ordinance could not contravene the terms of the enabling act, no citation of authority should be necessary in support of a proposition that under the organic law of the State of Missouri the collector could not validly permit the deduction of any item unless such item constituted a "necessary expense of operation."

The appellants categorically state in their brief that the Federal income tax does constitute a necessary expense of operation within the meaning of the Missouri statute.

This question has not been decided by any Missouri court. Neither the appellants nor any other taxpayer have seen fit to invoke the jurisdiction of the Missouri courts, so freely and liberally given by the Constitution and laws of Missouri, for the purpose of obtaining a judicial determination as to whether the Federal income tax does or does not constitute a necessary expense of operation within the meaning of the statute.

It would, of course, be ridiculous to contend, as appellants apparently do, that interest paid by a taxpayer on a **personal** indebtedness having no relation to the conduct of his business constitutes a necessary expense of operation. In the light of the limitation prescribed by the statute we submit that the construction placed by the appellants upon the regulations as permitting the deduction of interest on personal indebtedness or other items not connected with business, is wholly unwarranted.

The question as to whether or not a charitable contribution may constitute a necessary expense of operation is in our judgment not free from doubt in the light of the fact that local communities throughout the United States are dependent in large part upon gifts by large corporations and business enterprises and by the fact that the making of such gifts advances the public relations of the donor and enhances his standing and prestige in the community.

But whether or not Federal income taxes or charitable contributions do or do not constitute necessary expenses of operation the fact remains that the Missouri court has not passed upon the questions and it is the decision of the Missouri court which controls as to the construction of the Missouri statute.

Thus this court held in Illinois Central Railroad Company v. Minnesota, 309 U. S. 157, 84 L. ed. 670, that the

construction by the state court of the term "gross earnings" was a matter of state law.

The statutes of Missouri earlier noted provide that the declaratory judgment powers of a Missouri court shall include the power to render a declaratory judgment as to rules of an administrative officer or the threatened application thereof. Section 536.050, Mo. Rev. Statutes 1949. Thus it was open to the appellants in the very declaratory judgment act they brought to request the Missouri court to determine the meaning of the rules and regulations promulgated by the Collector and the effect of the rules or of any threatened application thereof. Thereby they could have obtained from a Missouri court an authoritative interpretation of the meaning and effect of the rules and this court would not be obliged to speculate as to such meaning and effect for the purpose of determining whether the state law offended the Federal Constitution.

In their brief the appellants say that "The Collector, unlike the Supreme Court of Missouri, was not willing to let the meaning of that concept [necessary expenses of operation] change from time to time as 'accepted methods of account change' " (Appellants' Brief 20).

The foregoing is a somewhat startling statement in view of the fact that the regulations on their face contain the following statement:

> "This first issue of the rules and regulations, which is **flexible**, is intended as a **guide** to those subject to the Earnings Tax and **will be supplemented from time to time** as may be necessary" (R. 22).

This court, speaking through Mr. Justice Frankfurter, in Spector Motor Service v. McLaughlin, 323 U. S. 101, 105, 89 L. ed. 101, said:

> "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication,

it is that we ought not to pass on questions of constitutionality—here the distribution of the tax power as between the State and the Nation—unless such adjudication is unavoidable. And so, as questions of Federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that Federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law."

Mr. Justice Douglas, delivering the majority opinion of the court, in American Federation of Labor v. Watson, 327 U. S. 582, 595, 596, 90 L. ed. 873, said:

"The merits involve substantial constitutional issues concerning the meaning of a new provision of the Florida constitution which, so far as we are advised, has never been construed by the Florida courts. Those courts have the final say as to its meaning. When authoritatively construed, it may or may not have the meaning or force which appellees now assume that it has. In absence of an authoritative interpretation, it is impossible to know with certainty what constitutional issues will finally emerge. What would now be written on the constitutional questions might therefore turn out to be an academic and needless dissertation."

In the more recent case of Albertson v. Millard, 345 U. S. 242, 245, 97 L. ed. 983, 73 S. Ct. 600, the court in a per curiam opinion said:

"We deem it appropriate in this case that the state courts construe this statute before the District Court further considers the action."

As we have heretofore said, the appellants are not foreclosed by the adjudication in this case from instituting in the future an appropriate declaratory judgment action for the purpose of obtaining a binding adjudication by the

Missouri court as to the meaning and effect of the rules and regulations.

We submit that this court will have fully discharged its constitutional function if it limits its decision in this case to a consideration of the question as to whether the statute per se and the ordinance per se contravene the equal protection clause of the Fourteenth Amendment.

D.

If Federal Income Tax and Charitable Contributions Constitute Necessary Expenses of Operation Under the Missouri Law the Allowance Thereof as Deductions Does Not Render the State Law or the City Ordinance Invalid.

We have heretofore indicated that in our view the allowance of a deduction of any item that does not constitute a necessary expense of operation would be invalid as a matter of Missouri law for the reason that the enabling act specifically permits deduction of necessary operating expenses only.

If therefore the classification is invalid because it permits the deduction of necessary operating expenses by one who conducts a business and does not permit the deduction of necessary business expenses incurred by wage-earners and salaried employees, the **nature** and the **amount** of the operating expenses permitted to be deducted are immaterial.

Conversely, if the classification is valid it would seem that the nature and amount of operating expenses permitted would not and could not affect the validity of the classification.

The alleged classification is here attacked upon the ground that it creates discrimination. If wage-earner "X" becomes liable for a tax in the sum of $20.00,

whereas his tax liability, if he were permitted to deduct the cost of his working clothes, the cost of his transportation, and the depreciation on his tools (assuming that they are business expense), would be $5.00, he is discriminated against to the extent of the differential, that is to say $15.00.

If wage-earner "Y" is subject to a tax of $20.00, and if his tax liability would be only $5.00 in the event he were permitted to deduct his Federal income tax, he is discriminated against to the extent of the differential, to-wit, $15.00.

Would the appellants have this court hold that the discrimination against "X" because it arises out of a failure to allow his particular business deductions does not offend the Fourteenth Amendment, whereas the discrimination against "Y" does offend the Fourteenth Amendment because it results from the fact that "Y" had to pay an income tax? We cannot see how in any constitutional sense the discrimination is or can be affected by the fact that in one case it arises out of the payment by the taxpayer of one type of business expense, whereas in the other case it arises out of a different type of business expense.

There, of course, may be sound reasons of state policy which would deny to persons engaged in the conduct of business the deduction of the amounts paid in Federal income tax even though such amounts could or might be regarded as necessary expenses of operation.

The existence of such reasons no doubt actuated the City of Philadelphia and the City of Louisville to provide in their respective ordinances for the disallowance of Federal income tax payments.

On the other hand there may be and there are sound reasons of public policy which could or might have actu-

ated the Legislature of the State of Missouri to permit the deduction of all necessary operating expenses including Federal income taxes.

The state law authorizes and the earnings tax law imposes a tax on the earnings of all persons, associations and partnerships residing in the City of St. Louis without regard to the place where the earnings were derived. In other words, a resident of the City of St. Louis engaged in the conduct of a business who has branches in other cities and in other states makes a return and pays a tax upon the whole of his net profits.

It is manifest that in those other cities and in those other states the St. Louis resident is competing with others who are not subject to the earnings tax imposed by the ordinance. It is clear that every new tax adds an additional burden which makes it more difficult for the taxpayer affected thereby to compete with others not subject to the same burden. In view of the fact that the net earnings derived by the St. Louis resident in this competitive field are subject to the tax, cannot the legislature of the state justifiably ameliorate the burden of the new tax so as to enable the St. Louis resident to compete in such a way as it may make it possible for him to derive the earnings from business outside of the city and the state?

Not only is the St. Louis resident who conducts business outside of the city limits affected by the competition of others but all persons doing business in the City of St. Louis, whether resident or not, and all corporations doing business in the City of St. Louis are subject to competition by others not subject to the tax.

Thus International Shoe Company, which has large manufacturing plants in the City of St. Louis and which desires to sell shoes to Edison Bros., Inc., which has numerous retail stores in the City of St. Louis, must meet

the competition of manufacturers in New England who likewise desire to sell their products to Edison Bros.

Wage-earners who earn their livelihood in the City of St. Louis are not faced with competition by others who can offer their services for a lesser amount because they are not subjected to the tax burden for every wage-earner who works in the City of St. Louis and is paid wages therein is subject to tax without regard to residence. These considerations would justify the legislature in granting a deduction of all necessary expenses of operation without exception, so as to lessen, in some degree, the tax burden of one class which is faced with the competition of others who are not liable for the same tax, as compared with the other class not subject to such competition.

E.

Appellants Did Not Plead, Nor Have They Offered Any Proof, of Any Special Injury to Them by Reason of the Imposition of the Tax.

In their petition (R. 6, par. 11) appellants allege "that said Ordinance and House Bill are arbitrary and discriminatory against wage earners as a class and **particularly against these plaintiffs.**"

There is no allegation in the petition amplifying this conclusion; there is no allegation pointing out how, or in what respect, the enabling act or the ordinance is arbitrary or discriminatory as to the particular plaintiffs.

The Agreed Statement of Fact contains no statement showing how or in what manner the appellants claim to be discriminated against. There is nothing in the record to indicate discrimination as against the appellants. It is argued in appellants' brief (p. 21) that the appellants may not deduct interest, union dues, chauffeurs' licenses, income

taxes and 5% of charitable contributions, whereas a self-employed truck driver may deduct such items.

While it is true that practically everyone must make income tax returns, yet without a showing of appellants' incomes, their deductions and their exemptions, it is impossible to determine whether or not they are subject to income tax. Likewise, they ask us to assume that they are subject to property taxes, union dues and other expenses they enumerate. In the state of the record, these are all matters of pure conjecture.

This contention assumes that the appellants pay the various enumerated items, although there is neither allegation nor proof of such payments.

We take it that this question is not presented by the record in the case at bar, because of the absence of both allegation and proof. As this Court aptly said in Roberts & Co. v. Emmerson, 271 U. S. 50, 54, 70 L. Ed. 827, 833:

> "But the plaintiff is not in a position to raise this question. As this court has often held, one who challenges the validity of state taxation on the ground that it violates the equal protection clause, cannot rely on **theoretical inequalities**, or such **as do not affect him**, but must show that **he is himself affected unfavorably by the discrimination of which he complains.**"

And to like effect are:

Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 121, 65 L. Ed. 165, 169;

Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 324, 80 L. Ed. 688, 698.

The rule was recently restated in Keegan v. United States, 325 U. S. 478, 506, 89 L. Ed. 1745, 1760, where it is said:

"No one can urge the unconstitutionality of a statute until he shows that it is applicable to him and **that he is injured by it.**"

And see Alabama State F. of L. v. McAdory, 325 U. S. 450, 461, 89 L. Ed. 1725, 1734.

It is clear that under the announced rule appellants have failed to plead or prove any injury for which relief may be granted.

CONCLUSION.

We have set out in our "Summary of Argument," supra, the several reasons upon which an affirmance of the decision of the Supreme Court of Missouri may properly be based. It is our position that these several grounds require an affirmance of the judgment.

Respectfully submitted,

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City Counselor,

JOHN P. McCAMMON,
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Attorneys for Appellees.

BLEED THROUGH-

APPENDIX.

Sec. 52.010, R. S. Mo. 1949:

"The offices of sheriff and collector shall be distinct and separate offices in all the counties of this state, and at the general election in 1906, and every four years thereafter, a collector, to be styled the collector of the revenue, shall be elected in all the counties of this state, who shall hold their office for four years and until their successors are duly elected and qualified; provided, that nothing herein contained shall be so construed as to prevent the same person from holding both offices of sheriff and collector."

Sec. 52.020, as repealed and re-enacted, Laws, 1951, page 386:

"Every collector of revenue in the various counties in this state, and the collector of the revenue in the city of St. Louis, before entering upon the duties of his office, shall give bond and security to the state, to the satisfaction of the county courts, and in the city of St. Louis, to the satisfaction of the mayor of said city, in a sum equal to the largest total collections made during any one month of the year preceding his election or appointment, plus ten per cent of said amount; provided, however, that no collector shall be required to give bond in excess of the sum of seven hudred and fifty thousand dollars, conditioned that he will faithfully and punctually collect and pay over all state, county and other revenue for the four years next ensuing the first day of March, thereafter, and that he will in all things faithfully perform all the duties of the office of collector according to law. * * *"

In the
SUPREME COURT OF THE UNITED STATES.

October Term, 1953.

FRANK WALTERS and EDWARD WILLIAMS, JR., Appellants, vs. THE CITY OF ST. LOUIS, JOSEPH M. DARST, Mayor, and DEL L. BANNISTER, Collector, Appellees.	No. 389.

CERTIFICATE OF SERVICE.

Receipt is hereby acknowledged of two copies of the brief of the appellees in the above-entitled cause this Friday, January 22, 1954.

Stanley M. Rosenblum,
Attorney for Appellants.

SUPREME COURT OF THE UNITED STATES

No. 389.—October Term, 1953.

Frank Walters and Edward Williams, Jr., Appellants, *v.* The City of St. Louis, et al. } On Appeal From the Supreme Court of Missouri.

[March 15, 1954.]

Mr. Justice Jackson delivered the opinion of the Court.

This appeal challenges a municipal income tax ordinance which excises gross salary and wages of the employed but only net profits of the self-employed, of corporations and of business enterprises. Appellants, who are wage earners, sued in the state courts for a declaratory judgment and injunction to prevent their employer from withholding the tax and the City from collecting it. Their contention is that the discrimination between wages and profits which results from allowing certain deductions only to profits violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. It has been overruled by the state courts and is brought here for determination.

The power or jurisdiction of the City to tax these appellants on their earnings is not open to question on federal grounds. There is no issue as to extraterritorial application of the tax or as to burden upon interstate commerce. The taxpayers, the withholding employer, the taxable income earned, were all clearly within the territorial jurisdiction and power of the State and of the municipality to which its taxing authority was delegated. The sole question here is whether in levying a tax on those whom it has plenary power to tax, the City has introduced classification and discriminations so unrea-

sonable as to deny to appellants due process or equal protection of the law.

A weakness of the appellants' case is that its anticipatory character precludes consideration of any contentions insofar as they depend upon actual application of the tax or the regulations promulgated for its administration. This action was commenced almost immediately after the Act became effective. A portion of appellants' wages has been withheld by their employer, but the City has not yet collected the tax. There is no evidence as to how the amount withheld from appellants compares with taxes collected from self-employed persons or businesses. The complaint attacks only the state legislative Act delegating power to the City of St. Louis and the taxing ordinance enacted by that City.

In the courts below the appellants also attempted to rely upon claims of discrimination resulting from regulations adopted by the municipal taxing authorities. But the Supreme Court of Missouri held the regulations were not before the court, declined to consider them to be a part of the ordinance, and intimated that the regulations might be held void hereafter without invalidating the ordinance. Missouri authorizes a petition for amendment or repeal of regulations promulgated by an administrative officer and grants a full judicial review of his final decision thereon or any other order that affects private rights.[1] Appellants have taken no steps to procure such relief. We are uninformed either as to what

[1] Mo. Const., Art. 5, § 22, provides: "All final decisions, findings, rules and orders of any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; and such review shall include the determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record." This provision is supplemented by Mo. Rev. Stat. Ann., 1949, §§ 536.010–536.140.

the administrative practice actually is or whether it conforms with Missouri law. Of course, we will not undertake to review what the court below did not decide. The state court has not passed on any question of discrimination arising from the regulations or any question as to the interpretation or validity thereof. We have here only the very limited issue—does the statute or the ordinance on its face violate the Fourteenth Amendment?

The Act of the Missouri Legislature is simply a general enabling Act, so far as relevant, authorizing the City to levy "an earnings tax on the salaries, wages, commissions and other compensation earned by its residents; . . . on the net profits of associations, businesses or other activities conducted by residents; . . . and on the net profits earned by all corporations as the result of work done or services performed or rendered and business or other activities conducted in the city." [2] However, it authorizes the municipality to provide "for deductions and exemptions from salaries, wages and commissions of employees . . . ." [3] It directs that net profits shall be

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[2] "Any constitutional charter city in this state which now has or may hereafter acquire a population in excess of seven hundred thousand inhabitants, according to the last federal decennial census, is hereby authorized to levy and collect, by ordinance for general revenue purposes, an earnings tax on the salaries, wages, commissions and other compensation earned by its residents; on the salaries, wages, commissions and other compensation earned by nonresidents of the city for work done or services performed or rendered in the city; on the net profits of associations, businesses or other activities conducted by residents; on the net profits of associations, businesses or other activities conducted in the city by nonresidents; and on the net profits earned by all corporations as the result of work done or services performed or rendered and business or other activities conducted in the city." Mo. Rev. Stat. Ann. (1953 Supp.), § 92.110.

[3] "The municipal assembly of any such city may provide for deductions and exemptions from salaries, wages and commissions of employees and may provide for exemptions on account of the wives, husbands and dependents of such employees." Mo. Rev. Stat. Ann. (1953 Supp.), § 92.140.

ascertained "by deducting the necessary expenses of operation from the gross profits or earnings." [4] It does not limit deductions allowable to wage earners or define the necessary expenses allowable in arriving at net profits.

As to the matters complained of, the ordinance is almost as general. It imposes the same rate of tax on salaries, wages, commissions and other earned compensation of individuals as it does on the net profits of the self-employed, corporations, associations and businesses.[5] But it does not make any express provision for deductions from earned income by wage earners such as appellants. As to those in business, it provides generally for deducting "the necessary expenses of operation from the gross profits or earnings." [6] It does not define necessary

[4] "The net profits or earnings of associations, businesses or other activities, and corporations shall be ascertained and determined by deducting the necessary expenses of operation from the gross profits or earnings." Mo. Rev. Stat. (1953 Supp.), § 92.150.

[5] The pertinent part of the ordinance is as follows: "A tax for general revenue purposes of one-half of one per centum is hereby imposed on (a) salaries, wages, commissions and other compensation earned after August 31, 1952, by resident individuals of the City, including the entire distributive share of any member of a partnership or association, less the amount thereof, if any, which may be shown to have been taxed under the provisions hereof to said association or partnership; and on (b) salaries, wages, commissions and other compensation earned after August 31, 1952, by non-resident individuals of the City, for work done or services performed or rendered in the City; and on (c) the net profits earned after August 31, 1952, of associations, businesses, or other activities conducted by a resident or residents, and on (d) the net profits earned after August 31, 1952, of associations, businesses, or other activities conducted in the City by a non-resident or non-residents; and (e) on the net profits earned after August 31, 1952, by all corporations as a result of work done or services performed or rendered, and business or other activities conducted in the City." City of St. Louis Ordinance 46222, § 2.

[6] Section 1 of the ordinance defines "net profits" as used in § 2 as "The net income of any association, business or corporation remaining after deducting the necessary expenses of operation from the gross profits or earnings."

expenses, but it authorizes the City Collector to promulgate appropriate rules and regulations.[7]

Appellants claim that the ordinance will allow self-employed persons and businesses to deduct such items as taxes (which appellants claim will include federal income taxes) and charitable contributions not in excess of five percent of net income, which deductions are not allowed to those who earn wages or salaries. This may be true if the ordinance is applied as they expect. Whether this will be the application of the tax we cannot tell, for the record before us does not show its actual impact on classes of taxpayers or its methods of administration. Therefore, appellants' basic position must be that any legislative classification which distinguishes on its face between wage earners and the self-employed is constitutionally prohibited.

On its face, the ordinance classifies incomes for taxation according to their sources, one category consisting of salary and wage income and the other of profits from self-employment or business enterprise. Classification of earned income as against profits is not uncommon, sometimes to the advantage of the wage earner and sometimes to his disadvantage. It is a classification employed extensively in federal taxation, which under appropriate circumstances allows deductions to the self-employed not allowed to employees,[8] discriminates sharply between earned income and capital gains,[9] and sets apart certain types of wage earning for social security tax and for benefits.[10] We cannot say that a difference in treatment of the taxpayers deriving income from these different sources is *per se* a prohibited discrimination. There is not

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[7] Section 9 of the ordinance.

[8] *E. g.*, I. R. C., §§ 22 (n), 23 (aa).

[9] Compare I. R. C., § 22 (a), with I. R. C., §§ 117 (b), (c).

[10] *E. g.*, I. R. C., §§ 1400, 1426.

so much similarity between them that they must be placed in precisely the same classification for tax purposes.

The assertion is made that wage earners and self-employed persons are in competition on the same level of endeavor, and reliance is placed on such cases as *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389. There the Court found discrimination between identical sources of revenue depending only on the incorporated or unincorporated character of the taxpayer. But here, varying taxes are not laid upon taxpayers engaged in precisely the same form of activity. Instead, this is a broad tax on income, and the income springs from many activities carried on by many types of business entities. Here the classification rests on the State's view that wage or salary income is relatively fixed, predictable and certain, while profits of business are fluctuating and unstable. In view of widespread taxing practices, we cannot say that this difference is insignificant or fanciful.

The power of the State to classify according to occupation for the purposes of taxation is broad. Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary. Cf. *Dominion Hotel, Inc.* v. *Arizona,* 249 U. S. 265; *Great Atlantic & Pacific Tea Co.* v. *Grosjean,* 301 U. S. 412; *New York Rapid Transit Corp.* v. *City of New York,* 303 U. S. 573; *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U. S. 535. "In its discretion it may tax all, or it may tax one or some, taking care to accord to all *in the same class* equality of rights." *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114, 121. It may even tax wholesalers of specified articles on account of their occupation without exacting a similar tax on the occupations of wholesale dealers in

other articles. Our disapproval of the wisdom or fairness of so doing is not a ground for interference. *Ibid.* "When a state legislature acts within the scope of its authority it is responsible to the people, and their right to change the agents to whom they have entrusted the power is ordinarily deemed a sufficient check upon its abuse. When the constituted authority of the State undertakes to exert the taxing power, and the question of the validity of its action is brought before this court, every presumption in its favor is indulged, and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action." *Green* v. *Frazier*, 253 U. S. 233, 239.

Judgment affirmed.

BLEED THROUGH-

SUPREME COURT OF THE UNITED STATES

No. 389.—October Term, 1953.

Frank Walters and Edward Williams, Jr., Appellants, *v.* The City of St. Louis, et al.	On Appeal From the Supreme Court of Missouri.

[March 15, 1954.]

Mr. Justice Douglas, with whom Mr. Justice Black joins, concurring in the result.

I am less confident than my Brethren that the Supreme Court of Missouri did not pass on the regulations as well as the ordinance. But I bow to their reading of the record, saving for a future day the serious and substantial question under the Equal Protection Clause raised by the regulations which grant employers deductions for taxes paid the federal government, yet do not allow employees a deduction for the same tax.